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THE
ONTARIO LAW REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1918.

REPORTED UNDER THE AUTHORITY OF THE
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JUDGES
OF THE
SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE HON. SIR WILLIAM RALPH MEREDITH, C.J.O.

“ “ JOHN JAMES MACLAREN, J.A.

“ “ JAMES MAGEE, J.A.

“ “ FRANK EGERTON HODGINS, J.A.

“ “ WILLIAM NASSAU FERGUSON, J.A.

Second Divisional Court.

THE HON. SIR WILLIAM MULOCK, K.C.M.G., C.J.Ex.

“ “ ROGER CONGER CLUTE, J.

“ “ WILLIAM RENWICK RIDDELL, J.

“ “ ROBERT FRANKLIN SUTHERLAND, J.

“ “ HUGH THOMAS KELLY, J.

HIGH COURT DIVISION.

THE HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., President.

“ “ RICHARD MARTIN MEREDITH, C.J.C.P.

“ “ BYRON MOFFATT BRITTON, J.

“ “ FRANCIS ROBERT LATCHFORD, J.

“ “ WILLIAM EDWARD MIDDLETON, J.

“ “ HAUGHTON LENNOX, J.

“ “ CORNELIUS ARTHUR MASTEN, J.

“ “ HUGH EDWARD ROSE, J.

MEMORANDA.

CALL TO THE BAR.

12th September, 1918.

Helen Beatrice Palen, William Henry Cecil Brien, Gordon Ranald Munnoch, Theresa Cherrier, David Edward Kelly, Joseph Laurence Valentine, Paul Home, Joseph Agapit Clermont, Fred Raymond Scandrett, Clarence Snider.

17th October, 1918.

Joseph Antoine Legris, John Gardner Leckie, John Alexander MacInnis, Samuel Cohen, William Gilbert Pugsley.

ERRATA.

Page 156, 4th line from bottom, *for* "1914" *read* "1904."

Page 195, 7th line from bottom, *for* "307" *read* "294."

Page 250, 26th line from top, *for* "207" *read* "217."

Page 368, 6th line from bottom, *for* "24" *read* "214."

Page 412, 14th line from top, *for* "38 O.L.R. 2" *read* "38 O.L.R. 3."

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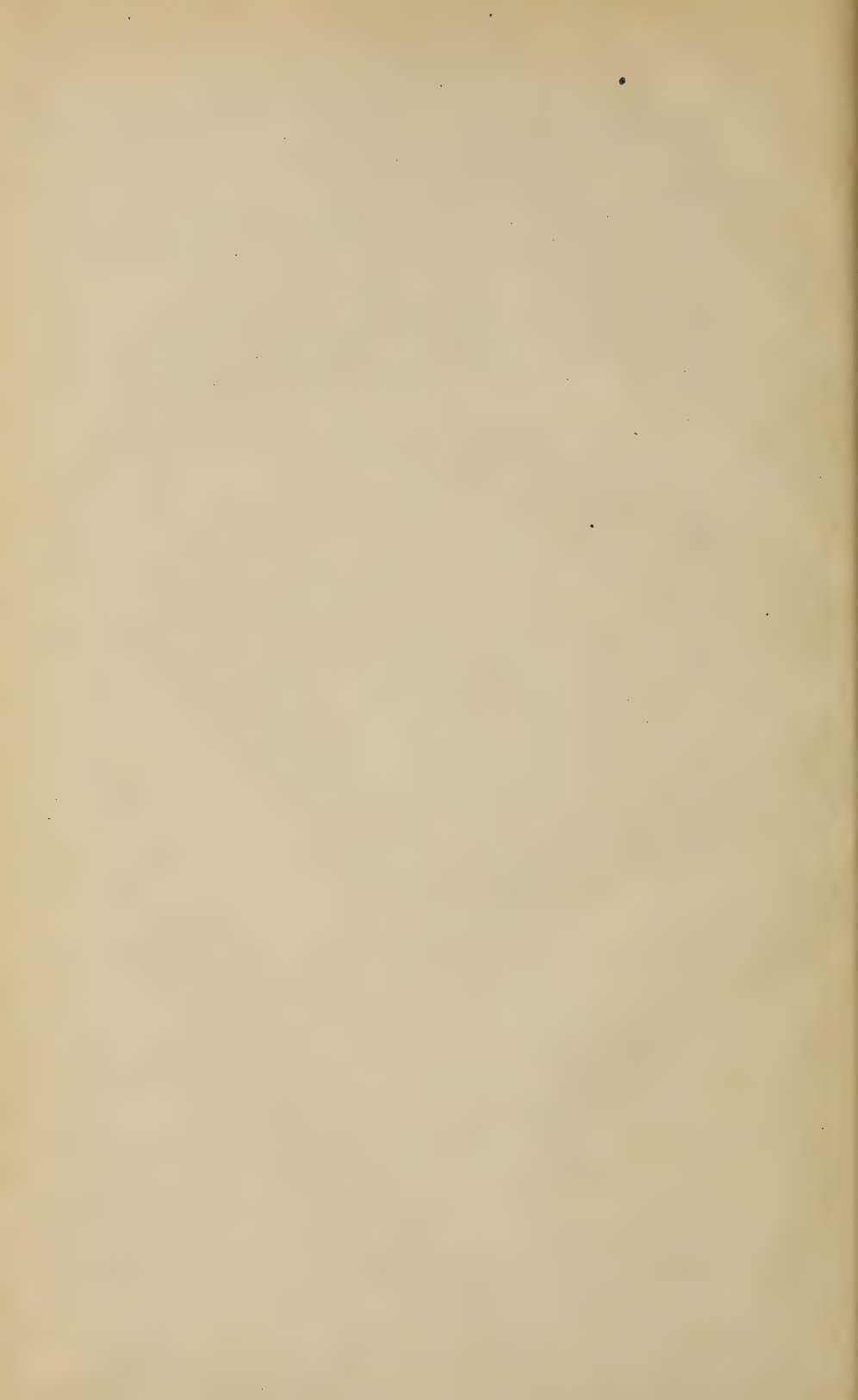
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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS).

[MIDDLETON, J.]

CLARKSON V. McLEAN.

1918

Jan. 14.

Executors and Administrators—Assets of Estate of Intestate—Bank-shares Subject to “Double Liability” Claim—Bank Act, 3 & 4 Geo. V. ch. 9, sec. 125 (D.)—Distribution of Shares among Next of Kin and of whole Estate without Providing for Liability—Devastavit—Personal Liability of Administrators—Sec. 130 of Act—Bar by Limitations Act—Personal Liability of Administrators upon Shares—Sec. 53—Liability of Assets of Intestate’s Estate in Hands of Administrators—Cause of Action Arising when Call Made upon Shares—Liability of Next of Kin upon Shares Transferred and Accepted—Transfers not Recorded—Effect in Equity of Acceptance—Sec. 43—Liability of Next of Kin to Extent of Assets Received—Suspension of Enforcement.

At the time of his death, M. was the holder of 14 shares of the capital stock of a bank, which was afterwards declared to be insolvent and ordered to be wound up. The shares passed to the administrators of M.’s estate, and were by them transferred to the next of kin, who accepted them as payments *pro tanto* of their shares in the estate, which was of the value of \$10,000 over and above all liabilities. The shares were subject to the “double liability” declared by the Bank Act, 3 & 4 Geo. V. ch. 9, sec. 125 (D.) Other assets, exceeding in value the amount of the liability upon the shares, were handed over to the next of kin; and the whole estate was thus distributed. The liquidator of the bank sued the administrators and the next of kin for the amount of the “double liability.”—

Held, that, when the administrators parted with the assets without providing for this liability, they were guilty of a *devastavit*, and so rendered themselves liable personally.

They might have made proper transfers to those beneficially entitled, and then have retained the assets for sixty days, when, if the bank had not suspended, they would have been safe: sec. 130 of the Bank Act.

But the Limitations Act afforded a defence to a claim as for a *devastavit*; for it constituted a new cause of action, and the action was not brought within six years from the time of the *devastavit*.

(2) The administrators were not personally liable upon the shares: sec. 53 of the Bank Act.

(3) The cause of action for the amount due upon the shares (the “double liability”) was based upon contract, and the time did not begin to run until there was a call; and so the liability of the administrators as administrators was not barred, for that was the liability of the deceased and of his estate. And the liquidator should have judgment against the administrators for the amount of the calls, interest, and costs, to be levied out of the goods etc. of the intestate in the hands of the administrators, if any.

Thorne v. Kerr (1855), 2 K. & J. 54, followed.

(4) As against the beneficiaries, the cause of action was upon the contract also; the liability upon the shares first accrued when the call was made in 1912; and the Statute of Limitations afforded no defence.

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(5) The next of kin were, at the time of the liquidation, the beneficial owners of the shares, and had accepted the transfers to them, though the transfers were not recorded in the books of the bank. Section 43 of the Bank Act requires registration; but the transferees were, in equity, bound to protect the transferors, and ought to pay. Each beneficiary was, in this view, liable for the shares transferred to him.

Hardoon v. Belilios, [1901] A.C. 118, applied.

(6) In a wider view, each individual was liable to refund and pay to the creditor the amount due, to the extent of the assets received by such individual, which formed part of the intestate's estate. But this remedy should not be invoked until it was ascertained whether those who ought to pay could be made to pay as transferees of the shares.

ACTION by the liquidator of the Farmers Bank of Canada against the administrators of the estate of one Mountain, a deceased intestate, and the persons beneficially interested in the estate, to recover the amount of the "double liability"* in respect of shares of the capital stock of the bank held by the intestate during his lifetime. The bank was ordered to be wound up, and the plaintiff was appointed liquidator in January, 1911.

January 11. The action was tried by MIDDLETON, J., without a jury, at Toronto.

J. W. Bain, K.C., and *M. L. Gordon*, for the plaintiff.

G. M. Clark, for the defendants the administrators.

J. T. Richardson, for the other defendants.

January 14. MIDDLETON, J.:—This action is brought by the liquidator of the Farmers Bank against the administrators of the estate of one Mountain, who died on the 25th May, 1909, to recover the amount of the double liability in respect of 14 shares held by the intestate during his lifetime and which passed to the administrators.

The liquidator also sues those beneficially interested in the estate, and bases his claim against them upon the fact that upon the winding-up of the estate the shares were distributed among the next of kin in specie; and also upon the fact that other assets, exceeding the amount of the liability upon the shares, were handed over to the next of kin.

*Section 125 of the Bank Act, 3 & 4 Geo. V. ch. 9 (D.), enacts:—

125. In the event of the property and assets of the bank being insufficient to pay its debts and liabilities, each shareholder of the bank shall be liable for the deficiency, to an amount equal to the par value of the shares held by him, in addition to any amount not paid-up on such shares.

2. "Shareholder," within the meaning of this section, shall include an undisclosed principal and, to the extent of his interest, a *cestui que trust*, on whose behalf or for whose benefit shares in the capital stock of the bank are held.

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The facts were not fully known at the time the action was brought, and the pleadings should be amended so as to make them conform to the evidence at the hearing. The estate of the deceased was worth some \$10,000 over and above all liabilities; and there is no reason why the double liability in respect of this stock should not be realised upon for the benefit of the creditors of the bank.

When the estate came into the hands of the administrators, they were quite alive to the liability which this stock might impose upon its owner, and probably were afraid that some personal liability might result, and so they devised the scheme of transferring the stock to the name of Isabella McLean, an absolutely impecunious old lady, who lived with Dobson, one of the administrators, as a member of his family. This was said in the pleadings to be a transfer for value. The transfer was on the 16th March, 1910. At the trial it was sworn to be a gift. In truth it was a mere sham and pretence, for the dividend cheque which came after the transfer was endorsed over by Miss McLean and treated as an estate asset, and the stock was thereafter dealt with as an estate asset, and Miss McLean, at the instance of Dobson, transferred the shares to the beneficiaries, and they accepted them as payments *pro tanto* of their shares in the estate.

When the estate was wound up in this way, there was still a balance of \$600 in the administrators' hands on the passing of the accounts, but I assume, though it was not proved, that this balance was then distributed.

The transfers to the beneficiaries were not recorded in the bank books at the time of the liquidation, and were found only on the day of the trial among the papers of the estate in the hands of the executors of the solicitor who wound up the affairs of the estate.

The administrators of the estate were not personally liable upon this stock by virtue of sec. 53* of the Bank Act, but the assets of the estate in their hands were liable.

*53. No person holding stock in the bank as executor, administrator, guardian, trustee, tutor or curator—

(a) of or for any estate, trust or person named in the books of the bank as being represented by him; or,

(b) if the will or other instrument under or by virtue of which the stock is so held be named in the books of the bank in connection with such holding,— shall be personally subject to any liability as a shareholder; but the estate and funds in his hands shall be liable in like manner and to the same extent as

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When the administrators parted with the assets without providing for this liability, they were guilty of a devastavit, and so rendered themselves liable personally.

They had a simple course open to them, for they might have made proper transfers to those beneficially entitled, and then have retained the assets for sixty days, when, if the bank had not suspended, they would have been safe: see sec. 130.†

But I think the Statute of Limitations affords a defence to the claim of devastavit. It constituted a new cause of action; and, as this action was not brought until 1917, more than six years have elapsed.

The cause of action, so far as it is a claim for the double liability upon the stock, is not barred, for this is based upon contract, and the time does not begin to run until there is a call, and so the liability of the administrators as administrators is not barred, for this is the liability of the deceased and of his estate.

This distinction is recognised in many cases. In *Thorne v. Kerr* (1855), 2 K. & J. 54, a bond creditor sued executors alleging a devastavit. The bond was not barred, but the devastavit was, more than six years before suit, and so the statute was a bar. "The bond is what leads up to the remedy, but the real foundation of the suit is the devastavit, as to which the remedy is barred by the lapse of six years."

This decision of Vice-Chancellor Sir W. Page Wood is recognised in *In re Baker* (1881), 20 Ch.D. 230, 235; *In re Gale* (1883), 22 Ch.D. 820, 826; *In re Marsden* (1884), 26 Ch.D. 783,

the testator, intestate, ward or person interested in such estate and funds would be, if living and competent to hold the stock in his own name.

2. If the trust is for a living person or corporation, such person or corporation shall also be liable as a shareholder to the extent of his or its respective interest in the shares.

3. If the estate, trust or person so represented, or will or other instrument, is not named in the books of the bank, the executor, administrator, guardian, trustee, tutor or curator shall be personally liable in respect of the stock, as if he held it in his own name as owner thereof.

†130. (a) Persons who, having been shareholders of the bank, have only transferred their shares, or any of them, to others, as hereinbefore provided, within sixty days before the commencement of the suspension of payment by the bank; and,

(b) Persons whose subscriptions to the stock of the bank have been forfeited, in manner hereinbefore, provided, within the said period of sixty days before the suspension of payment by the bank;

Shall be liable to all calls on the shares held or subscribed for by them, as if they held such shares at the time of such suspension of payment, saving their recourse against those by whom such shares were then actually held.

789; *In re Hyatt* (1888), 38 Ch.D. 609, 616; and *Lacons v. Warmoll*, [1907] 2 K.B. 350.

The cause of action which is asserted when a devastavit is alleged is one based upon the wrongful action of the executor, who, it is alleged, has made himself personally liable for a debt which was not his, by his misconduct, and as against him the action is barred upon the lapse of the limit prescribed, quite irrespective of the limit affixed to the claim against the assets of the estate, had they not been wasted.

As against the persons beneficially entitled, the liquidator can recover upon either of the grounds alleged, and the Statute of Limitations affords no defence.

As against them the cause of action is upon the contract, and the liability upon the shares first accrued when the call was made in 1912.

They were, at the time of the liquidation, the beneficial owners of the stock, and had accepted the transfers to them, even though not recorded.

Section 43 requires registration to make a transfer valid; but, where there has been an actual transfer, the transferee is bound to indemnify the transferor; and the transferee is in equity the one who ought to pay. Where, as here, the estate was liable in the hands of the administrators, and the stock was distributed among those beneficially entitled to the estate, and at the same time other assets of value of far greater amount were likewise distributed, the persons who received their shares, in equity undertook to assume and protect the trustees against the incidental liability to call upon this stock.

The reasoning of *Hardoon v. Belilios*, [1901] A.C. 118, applies. This would only impose upon each beneficiary a liability for the shares transferred to him.

There is, however, a wider liability. Each of the next of kin is liable to refund and pay to the creditor the amount due, to the extent of the assets received by him, which formed part of the intestate's estate.

I do not think this remedy should be invoked until it is ascertained whether those who ought to pay can be made to pay as transferees of the shares. Probably this can be worked out among those liable without further aid from the Court; if not, leave will be reserved to apply.

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The judgment will be:—

(1) Against the administrators for the amount of the calls, interest, and costs, to be levied out of the goods etc. of the intestate which are in the hands of the administrators, if any.

(2) Declaring that the plaintiff has no personal right against the administrators for their devastavit, by reason of his remedy being barred by the Statute of Limitations.

(3) Declaring that the individual defendants to whom stock was transferred are each liable for a proportionate amount of the plaintiff's claim and of the costs, and (setting out the names and shares) directing payment accordingly.

(4) Declaring that each of the defendants who received a share in the estate is liable to pay to the plaintiff the amount so received, so far as may be necessary to enable him to receive payment in full, but that this remedy ought not to be asserted until the plaintiff has attempted to obtain satisfaction under the preceding clause.

(5) Reserving liberty to apply to a Judge in Chambers for leave to issue execution under the preceding clause.

(6) No costs as between the plaintiff and the administrators personally, or as to the defendant Isabella McLean, above mentioned.

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Jan. 18.

[MEREDITH, C.J.C.P.]

RE POULIN AND VILLAGE OF L'ORIGINAL.

Municipal Corporations—Money By-law—Municipal Act, secs. 2 (o), 263 (5), 289 (1)—Submission to Electors—Publication of By-law—Non-compliance with Direction of Statute—Voting in Accordance with Principles Laid down in Act—Result not Affected—Saving Enactment, sec. 150—Purpose of By-law—Improvement of Highways and Erection of Bridge—Two Sums to be Raised upon one By-law—"Object"—Municipal Act, sec. 288 (1) (a)—Interpretation Act, sec. 28 (i).

A money by-law of a village municipality was *held* not to be invalid, although it was not (before being submitted to the electors for their assent) published in a newspaper of the municipality, but was published, instead, in a newspaper of a neighbouring municipality: see secs. 289 (1), 263 (5), and 2 (o), of the Municipal Act, R.S.O. 1914, ch. 192.

No principle of the Act was disregarded; and there was no evidence that the non-compliance, strictly, with the prescribed manner of publication, affected the poll: sec. 150 of the Act (made applicable by sec. 274).

The by-law was one for raising money for the improvement of highways, including the erection of a bridge, part of a highway, all in the village—\$4,000 for the roads and \$2,000 for the bridge:—

Held, that an objection made, that the two sums could not lawfully be raised upon the one by-law—that some of the voters might desire to vote for raising one sum and against raising the other, and that there was no power, to deprive them of the right to do so—could not prevail.

The scheme was that of the municipal council, and none but the council could alter it, though the voters might defeat it—there was no power in any one to compel the council to divide the scheme.

Section 288 (1) (a) of the Act requires that the by-law shall recite the “object for which” the debt is to be created; but the object may be the building of several bridges, as well as one bridge; and the singular number includes the plural: sec. 28 (i) of the Interpretation Act, R.S.O. 1914, ch. 1.

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APPLICATION by B. R. Poulin for an order quashing a money by-law of the Village of L'Original, on the grounds: (1) of want of publication; and (2) of want of power in the village council to enact such a by-law.*

January 9. The application was heard by MEREDITH, C.J.C.P., in the Weekly Court, Toronto.

J. A. McEvoy, for the applicant.

The village corporation was not represented.

January 18. MEREDITH, C.J.C.P.:—The applicant, who is a merchant and publisher of a newspaper in the village of L'Original, seeks, in this application, the quashing of a money by-law of the

*The following provisions of the Municipal Act, R.S.O. 1914, ch. 192, may be referred to:—

Section 288.—(1) A money by-law shall recite:

(a) The amount of the debt intended to be created, and, in brief and general terms, the object for which it is to be created.

289.—(1) Except where otherwise provided by this or any other Act, a corporation shall not incur any debt the payment of which is not provided for in the estimates for the current year, unless a by-law of the council authorising it has been passed with the assent of the electors.

263.—(5) A copy of the proposed by-law . . . shall be published once a week for three successive weeks . . .

2 (o) “Published” shall mean published in a newspaper in the municipality to which what is published relates, or which it affects, or if there is no newspaper published in the municipality, in a newspaper published in an adjacent or neighbouring municipality; and “publication” shall have a corresponding meaning.

150. No election shall be or be declared to be invalid—

(a) For non-compliance with the provisions of this Act as to the taking of the poll or anything preliminary thereto or as to the counting of the votes; or

(b) By reason of mistake in the use of the prescribed forms; or

(c) By reason of any mistake or irregularity in the proceedings at or in relation to the election;

if it appears to the tribunal by which the validity of the election or any proceeding in relation to it is to be determined that the election was conducted in accordance with the principles laid down in this Act, and it does not appear that such non-compliance, mistake or irregularity affected the result of the election.

274. Except as otherwise in this Part provided, Part III. shall apply *mutatis mutandis* to voting on a by-law.

(Section 150 is one of the provisions of Part III.)

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municipality of that village, on the grounds (1) of want of publication and (2) of want of power in the council of that municipality to enact such a by-law.

The Municipal Act—R.S.O. 1914, ch. 192, secs. 263(5) and 2(o)—requires publication of the by-law in a newspaper of the municipality: but that was not done; the publication was in a newspaper of a neighbouring town; and the first question is, whether that non-compliance with this provision of the Act makes the by-law invalid.

Section 150 of the Act provides that it shall not, if “the election was conducted in accordance with the principles laid down in this Act, and it does not appear that such non-compliance . . . affected the result of the election.”

The principles applicable are: that such a by-law shall not be finally enacted without the assent of the qualified voters of the municipality first given at a poll taken for the purpose of obtaining such assent. It was not any principle of the Act that was disregarded: it was a disregard only of one of the requirements of the Act regarding the mode in which such principle should be carried into effect; and there is no evidence that the non-compliance, strictly, with the prescribed manner of publication, affected the poll. All that is deposed to, on this branch of the case, is that the applicant, from information received by his solicitor from the village clerk, has reason to believe, and believes, that the number of qualified voters was 226, while only 132 voted. But the applicant also deposed to his belief that ratepayers abstained from voting, for another reason stated by him: and in a village, such as L'Original, it is hardly possible that such a poll could have been taken without knowledge of it by all the voters who would have had notice of it through a publication in the local weekly newspaper: and there is no evidence of any want of such knowledge by any one concerned. There was publication in a newspaper likely to afford as much notice as the more local newspaper could. I cannot give effect to the attack upon the by-law on this ground.

As to the other ground: the by-law is one for raising money for the improvement of highways, including the erection of a bridge, part of a highway, all in the village; \$4,000 for the roads and \$2,000 for the bridge; and the applicant's contention is, that the two sums could not lawfully be raised upon the one by-law: that some of the voters might desire to vote for raising one sum

and against raising the other; and that there was no power to deprive them of the right to do so. That contention, however, cannot succeed, for the by-law is not, nor is the scheme, that of the applicant, or of the voters: it is the scheme and the by-law of the council, which none but the council could alter, though a scheme and a by-law which the voters might defeat. The council may, in their discretion, thus improve the roads and re-erect the bridge—which is part of a highway—or else do neither. There is no power in any one to compel them to divide their scheme. If the electors want that done against the will of the council, the one way to bring it about is to elect a council that will comply with their wishes—when they have an opportunity. There is, however, no evidence, of any kind, that a majority of the electors have any such desire; and it may well be that the scheme should be carried out in its entirety or not at all; but, as I have said, that is now a question for the council only.

Mr. McEvoy relied mainly upon the case of *Taprell v. City of Calgary* (1913), 10 D.L.R. 656, in support of this application: but that case was not in this Court, or involving any question arising out of the provisions of the Municipal Act of this Province, though it is said to have been decided upon similar legislation; and in it the facts were quite different from those of this case: and, in principle anything I have said in this case is not in accord with it, I am to that extent not in accord with the learned Judge who decided it.

The fact that the legislation there in question, as well as that in question here, requires that the by-law shall recite, among other things, “the object for which” the debt is to be created (sec. 288 (1) (a)), does not seem to me to aid the applicant at all: the one object may be the building of several bridges, as well as one bridge; and, if that were not so, the singular number includes the plural in the legislation of this Province: the Interpretation Act, R.S.O. 1914, ch. 1, sec. 28(i).

The application is refused; but, as no cause was shewn, and, if it had been, non-compliance with the requirements of legislative provisions should be discouraged, it is refused without costs.

[On the 25th March, 1918, the decision of MEREDITH, C.J.C.P., was reversed by the Second Divisional Court of the Appellate Division, and the by-law was quashed on the first of the above grounds. See 14 O.W.N. 57. The reasons for the decision of the Divisional Court will be reported in due course.]

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[APPELLATE DIVISION.]

Jan. 17.

ST. GEORGE MANSIONS LIMITED v. HETHERINGTON.

Landlord and Tenant—Lease of Suite of Apartments—Finding of Trial Judge that Suite Let Partly Furnished—Reversal on Appeal—Absence of Implication of Warranty of Fitness for Human Habitation—Action for Rent—Tenant Leaving Premises because Uninhabitable—Costs.

The rule that, in the case of a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied, is applicable to the letting of an unfurnished suite of apartments.

In a lease of a suite of apartments, the lessor covenanted to supply the premises with necessary heat and with hot and cold water, by means of pipes, radiators, and appliances contained in the suite, and also to provide "janitor service," but not to provide otherwise for the care of the premises; and there were also upon the premises, and forming a part thereof, a refrigerator with a waste-pipe leading therefrom, and certain window-blinds. No chattels were referred to in the lease:—

Held, that the lease was not a demise of furnished premises; and the case was not brought within the rule applied in *Davey v. Christoff* (1916), 36 O.L.R. 123, following *Smith v. Marrable* (1843), 11 M. & W. 5, and *Wilson v. Finch Hatton* (1877), 2 Ex. D. 336.

The finding of the Senior Judge of the County Court of the County of York that the premises were partly furnished, and his judgment dismissing an action for rent, were reversed on appeal.

More effective means might have been taken by the lessor to make the premises habitable; the lessee left the premises because they were infested with cockroaches, and the circumstances were so exceptional that, while the plaintiff should have the costs of the appeal, there should be no costs in the Court below.

APPEAL by the plaintiff company from the judgment of the Senior Judge of the County Court of the County of York, dismissing an action brought in that Court, and tried by him without a jury.

In the action the plaintiff company sought to recover \$219.34 for rental of a suite of apartments leased to the defendant for twelve months. The defendant moved out of the suite, before the expiry of the twelve months, because he deemed it uninhabitable. He paid the rent up to the time he moved out. The plaintiff company's claim was for the portion of the rent appropriate to the period between the defendant's abandonment and the re-letting of the suite by the plaintiff company.

The County Court Judge found that the suite was let to the defendant partly furnished; that there was a breach of the implied warranty that the premises were habitable; and therefore dismissed the action.

January 14. The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and KELLY, JJ.

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J. A. Macintosh, for the appellant company, argued upon the evidence that the apartments were let unfurnished; and that the case fell within the well-established rule of law that, in the case of the letting of an unfurnished house or apartment, a condition that it is fit for the purpose for which it is intended is not to be implied. If it should be held that there was such an implied warranty or condition in this case, the defendant had lost his right to complain by his acquiescence; he having remained a tenant, with the conditions objected to present, for eight months: *Sarson v. Roberts*, [1895] 2 Q.B. 395; *Wilson v. Finch Hatton* (1877), 2 Ex. D. 336.

George Wilkie and *S. A. A. Campbell*, for the defendant, respondent, contended that this case was one of a demise of realty, *plus* certain services—heat, water, janitor—which took the case out of the general rule as to habitableness: *Brymer v. Thompson* (1915), 34 O.L.R. 194, 543, 23 D.L.R. 840, 25 D.L.R. 831. The evidence also shewed that the suite was at least partly furnished, and that brought the case within the exception mentioned in the cases of *Davey v. Christoff* (1916), 36 O.L.R. 123, 28 D.L.R. 447; *Smith v. Marrable* (1843), 11 M. & W. 5; *Sutton v. Temple* (1843), 12 M. & W. 52; and *Hart v. Windsor* (1843), 12 M. & W. 68; and so a covenant of habitableness was implied. The respondent had not lost his rights by delay, because he had protested all along about the conditions.

Macintosh, in reply, contended that the evidence did not shew that the suite of apartments was a furnished one, and that the case did not come within the exception.

January 17. The judgment of the Court was read by CLUTE, J.:—Appeal from the Senior Judge of the County of York, who dismissed the action. The plaintiff now moves to set aside the judgment for the defendant and to render judgment for the plaintiff for \$219.34. The amount is not in dispute.

The writ is endorsed for rental of apartment number 3 in the St. George Mansions, under lease dated the 16th September, 1915, between the plaintiff and the defendant, for the period extending from the 1st June, 1916, to the 23rd August, 1916. The lease is

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dated the 16th September, 1915, and is made for twelve months from the 1st October, 1915. The premises are described as "the suite of rooms or apartments designated on plans on file at the offices of the lessor as suite number 3, consisting of eight rooms, besides the private hall and bath-room, located on the ground storey, situated at the south-west corner of St. George and Harbord streets, in the city of Toronto, and commonly known and described as the St. George Mansions, at a rental of \$80 per month." This covers the description, and no chattels are referred to in the lease. The evidence shewed that there was upon the premises, and forming a part thereof, a refrigerator with a waste-pipe leading therefrom—the evidence did not shew whether securely or permanently attached or not. There were also certain window-blinds or curtains, but the premises did not purport to be furnished premises, nor were they in fact.

The defendant occupied the premises from the date of the lease until the 31st May, 1916, and paid the rent therefor. In the affidavit in answer to the writ the defendant states that the "apartment was uninhabitable, and for that reason he moved out of said apartment."

The plaintiff entered and endeavoured to rent the premises, and did so rent them for the period subsequent to the 23rd August, and the rent claimed is for the intervening period between the abandonment by the defendant and the entry of the plaintiff.

The evidence established that the apartment was infested with cockroaches. They made their appearance and were observed a day or two after the defendant took possession. On the second day after possession they were found in great numbers climbing the wall, and many were killed by the defendant. The defendant made complaints from time to time, and the plaintiff promised to and did assist in the endeavour to exterminate them. The nuisance was much abated during the winter months, whether from the method adopted for their extermination or the cold weather does not very clearly appear. In the spring, however, they resumed their migrations, apparently coming from the adjoining premises, in large numbers. There is no doubt that the vermin became almost if not quite an intolerable nuisance to the premises, and were so at the time the defendant left. The defendant also complained a great deal, of noises from different causes, but princi-

pally from the occupants of the apartment above. There is some evidence, rather strong, to shew that the final cause of the defendant's leaving the premises was the disturbance suffered from the occupants of the apartment above; but the trial Judge has found, and there is evidence to support his finding, that the defendant left both on account of the nuisance of the cockroaches and of the noises complained of.

The trial Judge found that the premises were partly furnished. I am unable to find evidence to support the finding of the trial Judge in that regard. It is true that the lessor covenants to supply the premises with necessary heat and hot and cold water at all reasonable times, by means of the pipes, radiators, and appliances now placed therein, and also to supply such janitor service as may be necessary for the proper care of the building, but not so as to include any care of the premises therein demised.

This does not, in my opinion, bring the case within the rule applied in *Davey v. Christoff*, 36 O.L.R. 123, 28 D.L.R. 447, following *Smith v. Marrable*, 11 M. & W. 5, and *Wilson v. Finch Hatton*, 2 Ex. D. 336, 344. The former was the case of the letting of a furnished house. The cases are fully collected and considered in *Davey v. Christoff*, where the rule was applied to the case of a furnished theatre.

In closing the judgment in that case, Meredith, C.J.O., expressed the desire that nothing should be said by the Court which would tend to unsettle the well-established rule of law that, in the case of a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied.

This case does, in my opinion, fall within the rule. The facts are not such as to raise an implied warranty that the premises were habitable.

It is unnecessary to decide, had such an implication arisen, what would be the effect of the long-continued occupation by the tenant and payment of rent.

The judgment for the defendant should be set aside, and judgment entered for the plaintiff for \$219.34.

The circumstances are exceptional. The defendant has suffered considerable loss from no fault upon his part, except the refusal to occupy the premises longer. While compelled to follow

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the rule in a case like the present, one cannot but feel that the plaintiff is not entirely free from fault. The condition of the premises one would think must have been known, and more effective means might have been used to make them habitable.

The plaintiff is entitled to the costs of the appeal, but no costs of the Court below.

Appeal allowed.

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[APPELLATE DIVISION.]

Jan. 17.

MALDEN PUBLIC SCHOOL BOARD (SECTION 5) v. SELLERS.

Trial—Adjournment—Notice of Trial—Rule 252—Notice for Wrong Sittings Accepted—Notice for Proper Sittings—Defendant not Appearing—Judgment for Plaintiffs—Order Setting aside—Irregularity—Practice.

Where an action comes on for trial at a sittings, and the trial is at that sittings peremptorily adjourned till a later sittings, a new notice of trial for the later sittings is necessary: Rule 252.

A countermand of a notice of trial is not regular.

Friendly v. Carter (1881), 9 P.R. 41, approved.

Where the trial had been adjourned to the June sittings, and the plaintiffs (by mistake) gave notice of trial for the October sittings, and the action was entered for trial at the October sittings, but the plaintiffs, without formally countermanding their notice for the later sittings—and without any motion being made by either party—gave notice of trial for the June sittings, and caused the entry for trial to be correspondingly changed:—*Held*, that the defendant had accepted the plaintiffs' notice of trial for the October sittings, and, without an order setting it aside, the plaintiffs were bound by it; and a judgment for the plaintiffs pronounced at the June sittings, the defendant not appearing, was set aside.

AN action, in the County Court of the County of Essex, to recover school-moneys alleged to have been improperly paid out by the defendant.

Upon the action coming on for trial in October, 1916, the trial was, at the instance of the defendant, postponed: the County Court Judge endorsed on the record, "Adjourned peremptorily till the June sittings, 1917."

Notice of trial was served (it is said by mistake), by the plaintiffs, for the October sittings, 1917, and the action was entered for trial at that sittings. Subsequently, another notice of trial was served by the plaintiffs for the June sittings, 1917, and the entry for trial was correspondingly changed. No formal countermand of the previous notice of trial was served; nor did either party make any motion.

The defendant notified the plaintiffs that he would not attend at the June sittings, but that he relied upon the notice of trial already given for the October sittings.

The plaintiffs appeared at the June sittings, and insisted on the case going on; the defendant did not appear. The learned County Court Judge proceeded to the trial of the case, and gave judgment for the plaintiffs.

The defendant appealed.

January 17. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

D. L. McCarthy, K.C., for the appellant, argued that the plaintiffs should in the first place have given notice of trial for the June sittings. Having given notice for the October sittings, the second notice, that for the June sittings, amounted to an attempted countermand of the first notice, which was irregular: *Friendly v. Carter* (1881), 9 P.R. 41, referred to in Holmested's *Judicature Act*, 4th ed., p. 711.

A. W. Langmuir, for the plaintiffs, respondents, contended that the notice for the October sittings had been given by mistake, and this mistake had been rectified by the subsequent notice for the June sittings. This latter notice had been served in plenty of time, and no motion had been made to set it aside.

McCarthy, in reply.

Judgment was given immediately after the argument.

THE COURT held as follows:—

(1) Notwithstanding the peremptory adjournment to the June sittings, notice of trial was necessary: Rule 252.

(2) Without deciding whether the defendant could give notice of trial for the June sittings, 1917 (notwithstanding the plaintiffs' notice of trial for the October sittings, 1917), or whether he might not have the plaintiffs' notice of trial set aside, and without deciding whether the plaintiffs might have obtained an order setting aside their notice of trial as a mistake—in the event which happened, the defendant accepted the plaintiffs' first notice of trial, and, without an order setting it aside, the plaintiffs were bound by it.

(3) The plaintiffs' second notice of trial was in effect an attempted countermand of their first notice of trial; and a counter-

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mand of a notice of trial is not regular. *Friendly v. Carter*, 9 P.R. 41, approved.

The judgment was set aside, with costs of trial and appeal, payable by the plaintiffs forthwith after taxation.

[APPELLATE DIVISION.]

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APPELBE V. WINDSOR SECURITY CO. OF CANADA LIMITED.

Jan. 21

Judgment—Order Dismissing Action—Reversal on Appeal—Application by Defendants to Add to Order of Appellate Court an Order for Judgment for Plaintiff—Proposed Appeal to Supreme Court of Canada—Application Opposed by Plaintiff—Unnecessary Application—Right of Appeal to Supreme Court—Supreme Court Act, R.S.C. 1906, ch. 139, sec. 2 (e)—Amending Act, 3 & 4 Geo. V. ch. 51, sec. 1—Giving Defendants Conduct of Plaintiff's Case.

The order of SUTHERLAND, J., 40 O.L.R. 548, dismissing this action, having been set aside by an order made upon appeal to a Divisional Court of the Appellate Division, 41 O.L.R. 217, the defendants, having no defence upon the merits to the action, asked the same Divisional Court to add to its order a direction that judgment be entered in the action in favour of the plaintiff—the defendants' purpose being to have a judgment from which they could appeal to the Supreme Court of Canada. The application was opposed by the plaintiff, and was dismissed; the Court holding (1) that it was unnecessary, as a right of appeal existed even without the aid of the Act of 1913, 3 & 4 Geo. V. ch. 51, sec. 1, repealing para. (e) of sec. 2 of the Supreme Court Act, R.S.C. 1906, ch. 139, and substituting a new para. (e), which extended the right of appeal; and (2) that the defendants should not be given the conduct of the plaintiff's case against his will.

THIS was an action upon a mortgage. Soon after the action was begun, the defendants applied for and obtained an order dismissing it, upon the ground that it was brought in contravention of the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22 (O.), and the amending Act, 6 Geo. V. ch. 27: see the reported reasons of SUTHERLAND, J., 40 O.L.R. 548. The order of SUTHERLAND, J., was set aside on appeal: see the reported reasons of the Second Divisional Court of the Appellate Division, 41 O.L.R. 217.

The defendants now applied to the same Court for an order adding to its order setting aside the order dismissing the action, an order that judgment be entered in the action in favour of the plaintiff; the defendants' purpose being to have a judgment from which they could appeal to the Supreme Court of Canada.

December 18, 1917. The application was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

W. E. Raney, K.C., for the defendants, referred to Rules 220 and 222, and to sec. 27 of the Judicature Act.

A. W. Langmuir, for the plaintiff, opposed the application, on the ground that such an order would take out of the hands of the plaintiff the conduct of the action, and also on the ground that such an order was unnecessary.

January 21. The judgment of the Court was read by MEREDITH, C.J.C.P.:—This is a mortgage action, in which the defendants, soon after it was begun, obtained an order dismissing it, on the ground that it was brought in contravention of the moratory legislation of this Province: see *Appelbe v. Windsor Security Co. of Canada Limited* (1917), 40 O.L.R. 548; but, upon an appeal against that order, it was set aside: see *Appelbe v. Windsor Security Co. of Canada Limited* (1917), 41 O.L.R. 217: and the defendants now apply to this Court, in which that appeal was brought, to add to its order, discharging the order dismissing the action, an order that judgment be entered in the action in favour of the plaintiff.

The reason for this peculiar application is: that the defendants desire to appeal to the Supreme Court of Canada against the judgment of this Court directing that the order dismissing the action be set aside, and they fear that they may not have a right to do so unless the action is also determined against them; and that they are willing should be done, as they have no defence, upon the merits, to it.

But, on two grounds at least, it seems to me that the application should not be granted, assuming that we have power to grant it without the consent of the plaintiff: (1) because it seems to me to be unnecessary; for, if the defendants had the right to have the action dismissed as it was, and we have wrongly deprived them of that right, why should there not be a right of appeal even without the aid of the legislation of 1913,* extending the right of

* See the Dominion Act to Amend the Supreme Court Act, 3 & 4 Geo. V. ch. 51, sec. 1, which is as follows:—

1. Paragraph (e) of section 2 of the Supreme Court Act, chapter 139 of the Revised Statutes, 1906, is repealed and the following is substituted therefor:—

“(e) Save as regards appeals from the Province of Quebec, ‘final judgment’ means any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any action, suit, cause, matter or other judicial proceeding; and, as regards appeals from the Province of Quebec, ‘final judgment’ means, as heretofore, any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

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appeal? And, however that might be, (2) we ought not thus to give to the defendants the conduct of the plaintiff's case against his will.

I am in favour of refusing the application, so long as it is opposed by the plaintiff.

Application refused.

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Jan. 21

[APPELLATE DIVISION.]

MCDONALD v. PEUCHEN.

Indemnity—Action upon Covenant for—Judgment Recovered against Plaintiff—Interest—Costs—Defence to Action—Agreement Inconsistent with Deed Containing Covenant—Failure to Prove Independent Collateral Agreement upon Good Consideration—Special Endorsement—Applicability to Claim for Indemnity—Trial—Amendment—Rule 183—Claim for Damages for Deceit—Unassignable Claim—Duty to Set up in Former Action—Effect of Judgment—Proof of Amount of Claim—Indemnity against Payment of Money not actually Paid—Application of Money.

The plaintiff owed L. \$5,450; the defendant covenanted with the plaintiff that he would indemnify the plaintiff from the L. debt, except \$1,450 of it. The deed in which this covenant was contained did not fix the amount of the L. debt, but it was ascertained and settled between L. and the defendant's solicitor at \$5,450, and the ascertainment was evidenced by a writing signed by the solicitor. The plaintiff paid L. \$1,450, but no more. L. sued M. for \$4,000, and recovered judgment for that sum with interest, \$133.37, and costs, \$34.70. That judgment standing in full force and effect against the plaintiff, who was ready to pay it, and from whom it could be recovered by execution, this action was brought to recover the amount of the judgment in the other action, with interest; the action being based upon the defendant's indemnity covenant, and commenced by a specially endorsed writ of summons. The defendant, by affidavit filed with his appearance, set up as a defence an alleged agreement between himself and the plaintiff, that he (the defendant) should be allowed to defend for the plaintiff the action brought by L. and set up therein a claim which he said he had against L. as a defence to L.'s claim against the plaintiff; that the plaintiff broke the agreement by refusing to allow the defendant to defend L.'s action, and allowed judgment to go by default. This action went to trial upon a record made up of the writ and the affidavit only:—

Held, that the defence set up was not sustained by the evidence: for (1) nothing more than an informal understanding was proved; (2) the defendant had the opportunity which he said he desired—he had been brought in by the plaintiff as a third party in L.'s action, but found that he could get no relief therein, and was discharged out of it; and (3) the alleged agreement would have been inconsistent with the deed; nothing like an independent collateral agreement, based upon a good consideration, was proved; and no claim for reformation of the deed was made.

Held, also, that the plaintiff was entitled to recover in this action interest upon the amount of the judgment against him in the other action; and (*semble*) his costs, as between solicitor and client, incurred in the other action.

Held, also, *per* MEREDITH, C.J.C.P., that the plaintiff's claim was properly the subject of a special endorsement; and, if it were not, the defendant having gone to trial upon the record as framed, without objection, the trial could not be treated as a nullity, nor could the defendant be heard, upon appeal from the judgment at the trial, to complain of the irregularity.

Per RIDDELL and ROSE, JJ., that a claim for indemnity cannot be made the subject of a special endorsement; but, the action having been fully tried upon the merits, an amendment to meet the difficulty should be allowed, under the broad provisions of Rule 183.

Held, also, that the defendant's claim against L., being for damages for deceit, was not assignable; and, because of that and for other reasons, it could not be said that it was the duty of the present plaintiff to set up that claim in answer to L.'s action.

Held, also, that the judgment in the other action was not proof against the defendant in this action; but the plaintiff's claim in this action was well-proved by the settlement made and evidenced by the signature of the defendant's solicitor.

Held, lastly, that in an action for indemnity, law and equity now being administered in the one Court, a plaintiff may have judgment for the full amount for which he is indemnified, though he has yet paid no part of it, and may never pay any part of it—that is, in cases in which the defendant is not concerned in the application of the money; and in this case whether the plaintiff paid L. or not did not affect the defendant, the plaintiff alone being answerable to L.

Liverpool Mortgage Insurance Co.'s Case, [1914] 2 Ch. 617, and *British Union and National Insurance Co. v. Rawson*, [1916] 2 Ch. 476, followed.

Judgment of CLUTE, J., awarding the plaintiff the amount recovered in the former action, with interest, affirmed.

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AN appeal by the defendant from the judgment of CLUTE, J., at the trial at Ottawa, in favour of the plaintiff, in an action upon a covenant for indemnity.

The plaintiff's claim, as endorsed upon the writ of summons, was for the sum of \$4,182.34, being the amount due under a judgment for principal, interest, and costs, recovered by one Levesconte against the plaintiff for a balance of a commission on the sale of timber berths in the Province of Saskatchewan; the plaintiff alleging that the defendant had covenanted and agreed to indemnify and save harmless the plaintiff from any claim or demand by Levesconte for the commission; and claiming interest on the amount of the judgment.

December 18, 1917. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. W. Bain, K.C., for the appellant, argued that the plaintiff, in allowing judgment to go against him by default, had broken a verbal agreement between him and the appellant whereby the latter was to defend in the plaintiff's name any action which might be brought by Levesconte, or to set up his claim against Levesconte as a defence to the latter's action against the plaintiff. The plaintiff had refused to allow the appellant to defend the action which Levesconte brought, and had refused to accept an assignment of the appellant's claim against Levesconte. The pro-

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ceedings were irregular—a claim for indemnity could not be made the subject of a special endorsement. In any event the plaintiff should not be allowed interest upon the amount of the judgment against him in the other action. Nor should the appellant have to pay the costs of the other action. The appellant could not be ordered to pay the amount of the judgment to the plaintiff, as the latter had not yet paid the judgment in the former action: *Boyd v. Robinson* (1891), 20 O.R. 404; *Mewburn v. Mackelcan* (1892), 19 A.R. 729.

J. R. Osborne, for the plaintiff, respondent, argued that, as to any understanding between the parties outside of the written indemnity agreement, the respondent had done all that he was obliged to do when he notified the appellant of the institution of the Levesconte action. The respondent could not accept an assignment of a claim for damages for deceit. As to the irregularity of the proceedings, the appellant by his conduct had waived any irregularity; and, at any rate, the Court had ample power to remedy any defect without ordering a new trial. The plaintiff had been rightly allowed interest, and the costs of the other action, as he had acted rightly and wisely in not paying the \$4,000 to Levesconte without suit. As to the form of the judgment, counsel did not contend that it should stand in its present form.

Bain, in reply.

January 21. MEREDITH, C.J.C.P.:—Until this case was argued in this Court it seems to have been treated, by all concerned in it, as a simple case, depending mainly upon a single question of fact; and I am bound to say that it still seems to me to have been properly so treated, notwithstanding the length of the argument here and the number of new points raised here for the first time, and though some of them were first suggested by members of this Court.

The facts are not complicated: McDonald, the plaintiff in this action, owed Levesconte, a solicitor, \$5,450; Peuchen, the defendant in this action, covenanted with McDonald that he would “indemnify and save harmless” McDonald from the Levesconte debt, except as to \$1,450, part of it.

The deed in which this covenant is contained does not fix the

amount of the Levesconte debt, but it was ascertained, and settled with Levesconte, at \$5,450, by Peuchen's solicitor, just before the deed was made, and was put in writing by the solicitor, over his own signature, as appears in exhibit 4 filed at the trial of this action.

McDonald paid to Levesconte the \$1,450, but no more: and Levesconte thereupon sued McDonald for the rest of the debt, and, in that action, Levesconte recovered judgment against McDonald for the rest of the debt, \$4,000, with interest upon that sum, \$133.37, and costs of that action, \$34.70; and that judgment stands in full force and effect against McDonald, who is ready to pay it, and from whom it can be recovered by execution.

Then this action was brought by McDonald against Peuchen to recover the amount of the judgment in the other action, with interest; the action being based upon Peuchen's indemnity covenant.

The single defence, set up in the proceedings in this action, to the claim made in it, is thus stated in Peuchen's own words, under oath: "I agreed that if any action was brought by Levesconte I would take over the defence and defend the said action in the name of Hector McDonald and would set up my claim against Levesconte as a defence to Levesconte's claim against McDonald;" but that "the said McDonald refused to allow me to defend the action or to accept an assignment of my claim against Levesconte and allowed judgment to go by default."

These words are contained in Peuchen's affidavit made under Rule 56, and which, under that Rule, must shew the nature of the defence, "with the facts and circumstances which he deems entitle him to defend the action;" and which also, with the writ of summons in the action, constitutes the whole record for trial of the action.

It will be observed that in all this solicitor-prepared and client-sworn statement of defence there is not a word of any agreement on the part of McDonald to do anything; but at the trial, though still very indefinite, Peuchen went further in this respect, stating his defence in these words:—

"Q. I would like to know what was said between you and Mr. McDonald on that occasion? A. He was agreeable to assist me in this matter, and that is why that clause was put in the agreement.

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"Q. Do you recall how he expressed his agreeableness?
A. Except that he promised to do that, to allow me to be in a position to defend myself.

"Q. To defend yourself? A. Against the commission, I mean to say.

"Q. I suppose you mean defend yourself against the claim for commission? A. Yes.

"Q. And when was that understanding come to? A. We arranged the details prior to drawing out the agreement at the Chateau Laurier.

"Q. Where was the arrangement about your being given an opportunity to set up your claim? A. That was at the hotel prior to coming up to the office.

"Q. At the Chateau Laurier? A. Yes.

"Q. Upon which this agreement of the 9th of November was prepared? A. Yes."

Upon this single defence Peuchen failed at the trial, the learned trial Judge finding: (1) that no agreement, apart from that contained in the deed, was made; that that which took place beyond that amounted only to "an informal understanding," and so was not embodied in the deed which was afterwards made; and (2) that Peuchen was given all the opportunity which, under any circumstances, he could have been entitled to under this understanding, namely, an opportunity to come into the action of Levesconte against McDonald and raise there any question that the practice of the Court permitted; but found that he could get no relief in that action, and so was discharged out of it after having been brought into it by McDonald; so that in no sense was McDonald blameable.

I am quite in accord with the trial Judge in these respects, and desire only to add that another insuperable difficulty stood in the defendant's way: (3) he could succeed only, if at all, upon a reformation of the deed, for nothing like an independent collateral agreement based upon a good consideration was proved, and no claim for reformation was made. If it had been, doubtless the plaintiff would have been at the trial to testify in his own behalf, though that would hardly have been needful in view of the character of the testimony given at the trial in his absence, as to any verbal understanding.

The only other point raised at the trial was, whether the plaintiff was entitled to interest upon the amount of the judgment against him in the other action: the trial Judge gave him such interest, very properly I think, because the plaintiff is liable for interest upon that judgment, and liable because the defendant has hitherto broken his covenant to save him harmless from the claim in that action.

And not only were these the only questions raised at any time, until now, in this action, but they are the only grounds of this appeal; the appellant is therefore not entitled to the benefit of any of the other points suggested or raised upon the argument of this appeal: but, if he were, he must fail in respect of all of them, and therefore I shall deal with all of them.

First, it was said that the plaintiff's claim was one which could not be the subject of a special endorsement on the writ; and that, as it was so treated, that irregularity renders the whole of the subsequent proceedings invalid: a contention that I should have thought could hardly have been seriously advanced. The answers to it are obvious: the claim, being for an amount ascertained and fixed in writing by the defendant himself, was one which, the plaintiff seeking payment to himself of that amount, was the subject of a special endorsement: and, if it were not, it was not only so treated by the plaintiff, but equally, if not more so, by the defendant, who, instead of objecting to the irregularity, filed his affidavit of defence and proceeded to trial upon a record comprising, as Rule 56 permits, the special endorsement and that affidavit only; how then is it possible for him now to urge even irregularity, not to speak of nullity? And, if there had been no other waiver of irregularity, or estoppel from setting it up, having gone to trial on the record as it is, substantially accurate in all material matters, and having taken his chances upon that trial, it does seem to me to be but a waste of words to urge any judicial tribunal to treat that trial as a nullity and give either party another chance upon a record setting up the same issues in a different form of pleading.

Second, it was urged that the plaintiff is not entitled to interest and to the costs of the other action. The question of interest I have already dealt with; and as to such costs the plaintiff is entitled to them as between solicitor and client. According to

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the defendant's story, the plaintiff would have disregarded his "informal understanding" and have done the defendant a wrong if he had paid the \$4,000 without being sued: an action was necessary in order that Peuchen might have the opportunity of setting up in it his claim against Levesconte's claim against McDonald. So Levesconte was put to his action for Peuchen's benefit: and in third party proceedings Peuchen was brought into that action and given that which he sought; but, having got it, he found it of no use to him, and so allowed those proceedings to be discharged. All that he might, and should, have seen from the beginning, for how could it ever have been thought that Peuchen's claim against Levesconte for damages for deceit could defeat an action by Levesconte against McDonald for money payable by the latter to the former for work done by the former for the latter at his request? This became very evident to Peuchen's solicitors when they abandoned the third party proceedings; and now they are driven to another untenable position; they say that McDonald should have taken an assignment of Peuchen's claim against Levesconte and have enforced it against Levesconte by way of counterclaim in Levesconte's action against him. But why should he? No one in evidence even suggests that he ever agreed to do so; and, having regard to the character of this claim, it is quite impossible to believe that he would have so agreed had he been pressed ever so much to do so; and the more so as the claim is not an assignable one: and so the contention in favour of it falls to the ground.

The nature of Peuchen's alleged claim against Levesconte seems to be one for damages for deceit, said to have arisen in this way: that Peuchen was buying property for the sale of which Levesconte and another were to have a commission, which was said to amount to \$20,000; that Peuchen bought upon the agreement that he was to be allowed the amount of this commission, the amount of which was stated to be \$20,000; that that agreement was carried out, and that he got the benefit of that commission just as provided for in the agreement; but that he afterwards discovered that Levesconte and his associate got an additional sum of \$20,000 from his vendor; that, as he put it, the commission was \$40,000, not \$20,000, as he had been led to believe in making

the agreement under which he was to have the benefit of the \$20,000 only.

This transaction seems to have taken place in the year 1911: and so Peuchen, who now complains that McDonald, who had nothing whatever to do with the transaction, does not take an assignment of his claim in respect of it and prosecute it in his own name, has himself had the intervening years to prosecute the claim, but has done nothing whatever to enforce it. It also appears that Levesconte has large claims against Peuchen still outstanding; indeed from Peuchen's testimony at the trial of this action I gather that Peuchen was willing, somewhat recently, to settle all claims between them, "business and everything," on the basis of a payment by Peuchen to Levesconte of \$6,500 or \$6,000: Peuchen's testimony, as to that, is in these words:—

"Q. Didn't you offer Levesconte that day \$6,500 in full settlement of his total claim for your business and everything? A. We discussed the matter. I went to get his bill, and I have not got his full bill to this day.

"Q. You did make him a bulk offer that day to close up your account with him? A. Yes, with the view of offsetting my claim against him.

"Q. If he had agreed to take \$6,000 that day? A. I was trying to get his bills. I have not got anything in writing from him yet."

In all the facts and circumstances of the case, it does seem to me to require much assurance to contend that this stale claim of Peuchen against Levesconte and another, that other being in no way before the Court, should have been prosecuted in McDonald's name in Levesconte's action against McDonald, for a just debt, to which there was no defence: and to do so in the face of certain defeat because of the non-assignability of the claim.

Something was said about the want of proof of the amount of the plaintiff's claim, though no such point was made at the trial or in the notice of this appeal: I may, however, add that I do not see how the judgment in the other action could be proof against the defendant in this action: see *Ex p. Young* (1881), 17 Ch. D. 668; and *Walsh v. Webb* (1917), 38 O.L.R. 457, 34 D.L.R. 113; but what better proof could be desired of the amount of the claim than the proved fact that it was settled by the defendant, and that

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it is shewn in evidence over the signature of the defendant's solicitor?

This brings me to the last point, which was never taken by any one at any time until suggested from the bench here: and the parties were, I think, right in never having raised it: it has force only if we confuse an action for indemnity with an action upon a guaranty.

In an action for indemnity, in these days when law and equity are administered in the one Court, a plaintiff may have judgment for the full amount against which he is indemnified, though he has yet paid no part of it, and may never pay any part of it, that is, in cases in which the defendant is not concerned in the application of the money: and that is this case: whether McDonald pays Levesconte or not does not affect Peuchen, McDonald alone is answerable to Levesconte for this debt: see *Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617, and *British Union and National Insurance Co. v. Rawson*, [1916] 2 Ch. 476.

I have no doubt the judgment at the trial was right, and so would dismiss this appeal.

RIDDELL, J.:—The parties hereto were bargaining concerning the purchase by the defendant from the plaintiff of certain limits in Saskatchewan.

It appeared that Levesconte, a Toronto solicitor, was claiming from the plaintiff a large commission, some \$10,000. The plaintiff made a substantial reduction in his price in order to make a sale, but desired to be protected against the claim for commission. The defendant, being with Mr. Smellie, his solicitor, in Ottawa, called up Levesconte on the telephone, and it was arranged that Levesconte would accept \$5,450 for the commission; the defendant was assured by Levesconte that the plaintiff would be satisfied to pay \$1,450 of this. Then it was agreed by the parties hereto that the plaintiff should pay \$1,450 and the defendant \$4,000. But, when it came to drawing up the agreement, it would appear that there was a fear that Levesconte would not abide by his offer to accept \$5,450, but insist upon more. Accordingly, the agreement provided that the defendant would indemnify the plaintiff against any claim by Levesconte in excess of \$1,450. The clause (5) reads thus: "The said party of the second part" (the defendant) "shall

indemnify and save harmless the said party of the first part" (the plaintiff) "and those for whom he is acting, from any claim that may be made by R. C. Levesconte for commission in respect of the negotiations of sale of said limits over and above \$1,450."

The \$1,450 seems to have been paid. Levesconte sued the present plaintiff for the remainder, \$4,000, interest, etc. McDonald served a third party notice on Peuchen claiming an indemnity; Peuchen entered an appearance; McDonald let judgment go in favour of Levesconte; and the third party proceedings were set aside with costs. Peuchen opposed the third party proceedings, and asked for their dismissal, "on the one ground that when the judgment had been obtained in the action there was nothing further he could do to oppose that judgment."

This action was brought down for trial on what purported to be a specially endorsed writ and Peuchen's affidavit of merits. The trial took place before my brother Clute at the Ottawa sittings in October, when judgment was directed to be entered for the plaintiff for the sum of \$4,182.34 and interest from the 24th July, 1917 (the day of the teste of the writ), with costs. Formal judgment has been settled for entry for \$4,222.98 and costs. The defendant now appeals.

Much objection has been raised to the regularity of the proceedings; it has been pointed out, and truly, that a claim for an indemnity cannot be made the subject of a special endorsement. The so-called special endorsement reads thus:—

"The plaintiff's claim is for the sum of \$4,182.34, being the amount due on a judgment for principal, interest, and costs, obtained by one R. C. Levesconte against the plaintiff for balance of commission on the sale of timber berths numbers 1114, 1115, and 1157 in the Province of Saskatchewan, from the said plaintiff, acting for himself and as trustee for the estates of C. G. Frith, deceased, and Kenneth McDonald, deceased, to the defendant. By agreements in writing signed by the said defendant, dated the 9th day of November, 1915, and the 16th day of December, 1916, respectively, the said defendant covenanted and agreed to indemnify and save harmless the said plaintiff from any claim or demand by the said R. C. Levesconte for the said commission.

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"The following are the particulars:—

"June 29th, 1917. To judgment for said commission obtained by R. C. Levesconte against plaintiff on this date..... \$4,133.37
To taxed costs..... 34.70

\$4,168.07

"July 24th, 1917. To 25 days' interest to date,
\$4,168.07 at 5 per cent..... 14.27

\$4,182.34

"And the plaintiff will claim interest on the said sum of \$4,182.34 to judgment, at 5 per cent., and any further costs the plaintiff may be put to by reason of the defendant's default."

It is obvious that the present action is an action for indemnity, and not on the Levesconte judgment, and that the proceedings have been very irregular. But the whole merits of the case have been gone into, and it would be an absurdity to set aside the trial and have a new trial in a new action or on pleadings if that result can be avoided. I think it can.

Rule 183 is very broad and gives us the power to make all necessary amendments to secure the advancement of justice and the giving of judgment according to the very right and merits of the case: see *Cropper v. Smith* (1884), 26 Ch. D. 700, at p. 710; *Williams v. Leonard* (1896), 17 P.R. 73 (C.A.), etc., etc.

We should amend the proceedings by causing formal pleadings to be put in, if insisted upon, and the case can then be dealt with.

At the time of the issue of the writ, the plaintiff had paid nothing; we are told (but that, of course, does not appear in evidence) that since the trial of this action he has paid \$1,000.

The real ground for the defence and the appeal is an alleged agreement between the parties that in some way the defendant would be enabled to set up, against any claim by Levesconte, a claim which he had against Levesconte. As to this defence, I think the defendant has two difficulties, both impossible to get over.

1. The question of fact: I entirely agree with the learned trial Judge when he says: "I do not think that what took place prior to the drawing of the agreement, taking the defendant's own state-

ment of the matter, which seemed to me to be given very fairly, amounted to such an agreement as precluded the payment of the \$4,000 which was then agreed upon, until an arrangement had been made between the defendant and Mr. Levesconte. I think that it amounted to no more than this, that, so far as McDonald is concerned, if the defendant could intervene when a claim was made by Levesconte, he might do so, and the plaintiff did not object so far as he was concerned. I think that did not amount to an agreement; it only amounted to an informal understanding, which was not embodied in the subsequent agreement, and with respect to which the plaintiff did give to the defendant notice when he was served with a writ by Levesconte, affording the defendant an opportunity to come in and raise the question. He endeavoured to do so, but he found that the practice of the Court did not so permit. The plaintiff is not responsible for that. There is no obligation imposed upon the plaintiff to do that. So far as I can see, the plaintiff has not fallen short of what was the real understanding between the parties."

2. Moreover, the alleged agreement would have been inconsistent with the written agreement.

In no case can this defence succeed.

The form of the judgment next requires consideration.

At the hearing of the appeal, counsel for the respondent said that he could not contend that the judgment as entered should stand: that was, however, in deference to observations from the Bench, and the plaintiff should not be held to the admission if in fact the judgment is correct.

Contrary to the opinion I had at the hearing, I am now convinced that the judgment should stand—this conclusion is arrived at from a consideration of the English cases.

While it may not be easy to lay down the principle in logical terms, it would seem that if he who agrees to indemnify, insure, etc. (the precise form of the undertaking is immaterial), have an interest in the application of the money (e.g., if he be the owner of the equity of redemption subject to a mortgage or the like), he cannot be ordered to pay the amount to the person indemnified, insured, etc., but only to pay the creditor either directly or by paying into Court: *Boyd v. Robinson*, 20 O.R. 404; *Mewburn v. Mackelcan*, 19 A.R. 729; *In re Richardson*, [1911] 2 K.B. 705, at p. 713.

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But, if he has no interest in having the money reach the creditor, judgment may be given against him that he pay the amount to the indemnified: *Carr v. Roberts* (1833), 5 B. & Ad. 78; *Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617; *In re Perkins*, [1898] 2 Ch. 182; *British Union and National Insurance Co. v. Rawson*, [1916] 2 Ch. 476.

As to the amount, the judgment in *Levesconte v. McDonald* is not absolutely binding, although the amount mentioned in such a judgment has generally—and especially where, as here, there is no charge of fraud—been accepted as the true amount indemnified against.

Counsel for the defendant expressly says that “it is not suggested that he (the plaintiff) did it wrongfully,” although he says, “McDonald allowed a judgment to go by default against him for more than the actual commission which Mr. Levesconte was entitled to obtain from him.” No evidence is given looking toward such a defence, and the amount is satisfactorily proved. Of course fraud in obtaining the judgment might have been proved, and if proved would be a good defence at least *pro tanto*: *Powell v. Boulton* (1846), 2 U.C.R. 487. Our cases in which the judgment is taken as the true amount go back very far: *Roberts v. Rees* (1858), 5 U.C. L.J. O.S. 41; *Joice v. Duffy* (1859), *ib.* 141.

If there be no objection on the part of the defendant herein, the sum of \$4,133.37 may be taken as correct; if he objects, the true amount will be found by calculating the amount of \$4,000 with interest from the day of the teste of the writ in the former action.

The costs given by the former judgment amount to \$34.70. Where one is sued on a claim which some other should pay, he may or may not be entitled to charge that other with costs. The rule seems to be that, if the costs naturally follow from the contract, if they are to be taken as having been in the contemplation of the parties when the contract was entered into, they may be claimed against the indemnifier if the other act reasonably: *Hammond & Co. v. Bussey* (1887), 20 Q.B.D. 79; *Baxendale v. London Chatham and Dover R. W. Co.* (1874), L.R. 10 Ex. 35, as explained in *Agius v. Great Western Colliery Co.*, [1899] 1 Q.B. 413.

In the present case it is obvious from the defendant's own evidence that, when the contract was entered into, both parties

expected that Levesconte would have to sue to get the \$4,000; it was clearly contemplated that, when an action should be brought by Levesconte, the defendant herein should have notice so that he might make an effort to set up the claim he said he had against Levesconte. Had the plaintiff herein paid to Levesconte the \$4,000 without suit, the defendant would have reason to complain, although he might not have had any legal redress. The plaintiff, when sued herein, did notify the defendant, and the defendant took no steps then to do anything with his alleged claim against Levesconte. I think that the plaintiff should have his costs in that action provided for here.

As to the amount of these costs, the plaintiff acted as a prudent man should in allowing the judgment to go by default, knowing that he had no defence; the costs which he had to pay or was rendered by the judgment liable to pay, the defendant should be ordered to provide for.

He does not claim his own costs of defending the action brought by Levesconte. The authorities above quoted shew that he would be entitled to them against the defendant and that as between solicitor and client: *Howard v. Lovegrove* (1870), L.R. 6 Ex. 43; *Clare v. Dobson*, [1911] 1 K.B. 35—but, as no claim is made for these, we need pay no attention to them.

If the defendant does not object to the amount, the appeal should be dismissed with costs; if he does, the amount should be fixed by the Registrar at the cost of the defendant, and judgment be entered for that sum with costs here and below.

LENNOX, J., agreed that the appeal should be dismissed.

ROSE, J., agreed with RIDDELL, J.

Appeal dismissed with costs.

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[IN CHAMBERS.]

Jan. 28.

ERICKSON v. MCFARLANE.

Costs—Security for—Plaintiff Ordinarily Resident out of Ontario though Temporarily within—Application of Rule 373 (b)—Discretion.

Rule 373 provides that security for costs may be ordered, (b) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario:—

Held, that when there is shewn an actual and *bonâ fide* change of residence from without Ontario to a place within Ontario, before the cause of action accrued, the case is not within the Rule.

Kavanaugh v. Cassidy (1903), 5 O.L.R. 614, distinguished.

If there was a discretion, as said in *McTavish v. Lannin and Aitchison* (1917), 39 O.L.R. 445, it should be exercised, in this case, by refusing to order the plaintiff to give security.

AN appeal by the defendant McFarlane from an order of a Local Master dismissing an application by the appellant for an order requiring the plaintiff to give security for costs.

January 25. The appeal was heard by MIDDLETON, J., in Chambers.

G. C. Campbell, for the appellant, contended that the plaintiff was ordinarily resident out of Ontario, though he might be temporarily resident within Ontario: Rule 373 (b).*

A. A. Macdonald, for the plaintiff, supported the Master's order.

January 28. MIDDLETON, J.:—The plaintiff, a young man, was born in Sweden, and came to the United States some years ago. He is unmarried and has no relatives save an aunt, who lives at Dayton, Oregon. For a time he worked in Oregon, and joined a Lodge at Dayton. In January, 1917, he was employed by an agency at Minneapolis for the Shevlin-Clark Company, a lumber company operating in Northern Ontario, and came here. He was injured in the woods and taken to an hospital, and now claims that he was so negligently treated that he has a cause of action for malpractice.

On his examination for discovery, he spoke of Dayton as his home. He now says that he said this because he was a member of the Lodge there. He was not examined as to his residence or

*373. Security for costs may be ordered . . . (b) Where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario.

intention as to the future, and in the affidavit filed swears that he is not here temporarily, but intends to reside permanently in Ontario.

The mischief aimed at by the Rule was the law as declared in *Redondo v. Chaytor* (1879), 4 Q.B.D. 453, where it was said that a foreigner coming within the jurisdiction for the purpose of asserting a cause of action could not be ordered to give security so long as he was actually within the jurisdiction, even though the Court should be convinced that if his action failed he would depart under such circumstances as would preclude the recovery of any costs awarded.

All such should be given short shrift; but it seems to me the circumstances are widely different when, in good faith, a foreigner comes here, as this man did, with the intention of staying, and, after he has taken up residence in Ontario, suffers some injury for which he seeks redress.

The Rule requires that there must be shewn an ordinary residence out of Ontario and a temporary residence within Ontario. When there is shewn an actual and *bonâ fide* change of residence from without Ontario to a place within Ontario, before the cause of action accrued, then, in my view, the case is not within the Rule.

Kavanaugh v. Cassidy (1903), 5 O.L.R. 614, is very like this case, but I think the essential difference is the finding of fact that the plaintiff was "merely a transient visitor who may leave the country at any moment for his place of usual residence." No such finding of fact can, I think, be here made.

If, as is said in *McTavish v. Lannin and Aitchison* (1917), 39 O.L.R. 445, 37 D.L.R. 307, the order is discretionary, I would refuse it.

Appeal dismissed. Costs to the plaintiff in the cause as against the appealing defendant.

Middleton, J.

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1918

Jan. 28.

[IN CHAMBERS.]

REX v. CARSWELL.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41 (1)—Having Intoxicating Liquor in Place other than "Private Dwelling-house"—Flat in "Duplex House"—Sec. 2 (i) (i.)

One section of what is commonly called "a duplex house"—that is, two dwellings under one roof, an upper flat and a lower flat—is a "private dwelling-house" within the meaning of sec. 41 (1) of the Ontario Temperance Act, 6 Geo. V. ch. 50, and to have intoxicating liquor there is not an offence against the Act. Such a dwelling is not a "house or building the rooms or compartments in which are leased to different persons," within the meaning of sec. 2 (i) (i.) of the Act.

Rex v. Purdy (1917), 41 O.L.R. 49, distinguished.

MOTION for an order quashing the conviction of the defendant, by a magistrate, for having intoxicating liquor in a place other than the private dwelling-house in which the defendant resided, contrary to sec. 41 (1) of the Ontario Temperance Act, 6 Geo. V. ch. 50.*

January 25. The motion was heard by MIDDLETON, J., in Chambers.

G. H. Kilmer, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

January 28. MIDDLETON, J.:—The accused was convicted of having liquor in a place other than a private dwelling-house in which he resided, and fined \$200, under sec. 41 (1) of the Ontario Temperance Act.

The liquor was in one section of what is commonly called a

* Section 41 (1) of the Act is as follows:—

"41.—(1) Except as provided by this Act, no person, by himself, his clerk, servant or agent, shall have or keep or give liquor in any place wheresoever, other than in the private dwelling-house in which he resides, without having first obtained a license under this Act authorising him so to do, and then only as authorised by such license."

By the interpretation section of the Act, 2 (i), "'Private dwelling-house' shall mean a separate dwelling with a separate door for ingress and egress, and actually and exclusively occupied and used as a private residence."

But there is a sub-clause (i.) which provides:—

"(i.) Without restricting the generality of the above definition of a private dwelling-house, among other things which the expression 'private dwelling-house' does not include or mean, it shall not include or mean and shall not be construed to include or mean . . . any house or building the rooms or compartments in which are leased to different persons. . . ."

"duplex house." Under one roof there are two dwellings—the lower flat constituting one and the upper flat the other. There is no inside communication between the flats; each has its separate front and back door; the doors of the upper dwelling being reached by outside stairs.

The magistrate has erroneously assumed that this situation is covered by my decision in *Rex v. Purdy* (1917), 41 O.L.R. 49. The question here is quite different.

Undoubtedly the dwelling is a "private dwelling-house," as defined by the Act, unless it can be brought within the exceptions. The Crown contends that the dwelling ceases to be a "private dwelling-house" because it is a "house or building the rooms or compartments in which are leased to different persons:" sec. 2 (i), clause (i.), of the Act.

I do not think this contention is well-founded. The exception is confined to a subdivision of that which constitutes a private dwelling-house. An ordinary house ceases to be a private dwelling if there are boarders, or meals are sold, or the rooms are let to different persons. In similar circumstances, a duplex house ceases to be a private dwelling; but this clause does not destroy the character given to the duplex house as "a private dwelling-house," by the main provision, merely because the different dwellings have different tenants.

The question in the *Purdy* case depended upon other parts of the same clause, which provided that no building in which there was an office or shop could be a private dwelling-house within the meaning of the statute.

I think the conviction must be quashed, and the fine should be refunded, with costs.

Middleton, J.

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[IN CHAMBERS.]

Dec. 15.

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HENNEFORTH V. MALOOF.

Jan. 28.

Slander—Defence—Justification—Particulars—Discovery—Order for Better Particulars—Affidavit Verifying—Practice.

Where the defendant in an action for slander pleads justification, he must state in his plea, or in particulars delivered to supplement the plea, the facts upon which he relies for justification; and, until such particulars are given, the defendant is not entitled to examine the plaintiff for discovery. The plaintiff is not bound to make affidavit of denial before he call upon the defendant for particulars.

Zierenberg v. Labouchere, [1893] 2 Q.B. 183, and *Arnold & Butler v. Bottomley*, [1908] 2 K.B. 151, followed.

Where an order was made requiring the defendant to deliver particulars of a plea of justification, and the particulars delivered did not comply with that order, an order was made setting aside the particulars delivered, with liberty to the defendant to deliver new particulars, verified by his oath that they "are to the best of his belief true and as full and accurate as he can make them in view of the knowledge he now has."

AN appeal by the plaintiff from an order of the Master in Chambers dismissing the plaintiff's motion to strike out para. 3 of the statement of defence in an action for slander, or for particulars thereunder.

December 14, 1917. The appeal was heard by CLUTE, J., in Chambers.

J. M. Ferguson, for the plaintiff.

R. McKay, K.C., for the defendant.

December 15, 1917. CLUTE, J.:—The action is for slander. The words charged are: "She" (meaning the plaintiff) "is a common whore and prostitute."

The plea objected to is: "The defendant, besides denying as aforesaid that he spoke of and concerning the plaintiff the words set out in paragraph 3 of the statement of claim, alleges, as the fact is, that, if the said words were spoken by him, the same were true in substance and in fact."

The plaintiff contends that the facts upon which this plea is based should be stated in the plea, or particulars should be given of the facts upon which the defendant intends to rely in support of the plea.

The present system of pleading requires a concise statement

of the material facts upon which the party pleading relies. When a general charge is made, the defendant must state specifically the facts upon which he relies as supporting the charge which he justifies, in order that the plaintiff may know what facts he is to meet and have an opportunity of denying them: Halsbury's Laws of England, vol. 18, p. 673, para. 1245.

Zierenberg v. Labouchere, [1893] 2 Q.B. 183 (C.A.), was an action in respect of an alleged libel published in the newspaper of which the defendant was the proprietor. The article averred that the plaintiffs were "charity swindlers" and "impostors," and that the "Home" which they carried on was a "monstrous swindle." Lord Esher, M.R., at p. 186, refers to the judgments of Ashurst and Buller, J.J., in *J'Anson v. Stuart* (1787), 1 T.R. 748, quoting the former as saying: "'When he'—that is, the defendant—took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge in order to maintain his plea: Then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life.'" Lord Esher then proceeds: "That is a leading case on the subject, and at the time when it was decided it was necessary to put the particulars in the plea. Afterwards the practice was varied, and a defendant could make his plea general; but he was still bound before he went to trial to give as particulars the same matters that he would formerly have been bound to put in his plea." He quotes Parke, B., in *Hickinbotham v. Leach* (1842), 10 M. & W. 361, at p. 363, as saying: "It is a perfectly well-established rule in cases of libel or slander, that where the charge is general in its nature, the defendant, in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff." Alderson, B., during the argument (p. 363) said: "The plea ought to state the charge with the same precision as in an indictment."

In *Gourley v. Plimsoll* (1873), L.R. 8 C.P. 362, the opinion was expressed that the more convenient course was that a plea of justification in general form should be allowed with full particulars of the matters intended to be relied on in justification. See Odgers on Libel and Slander, 5th ed., Can. Notes, p. 190, where these and other cases are referred to.

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In *Chalmers v. Shackell* (1834), 6 C. & P. 475, at p. 478, Tindal, C.J., said that at the trial the plea must be proved as strictly as an indictment for the offence which it imputes.

In *Arnold & Butler v. Bottomley*, [1908] 2 K.B. 151, it was held that, as the particulars of justification contained no specific instances of the misconduct alleged, they were too general to entitle the defendants to inspection of the plaintiffs' books, following *Yorkshire Provident Life Assurance Co. v. Gilbert*, [1895] 2 Q.B. 148. Farwell, L.J., said ([1908] 2 K.B. at p. 156): "A defendant in a libel action who pleads justification must state in his defence or particulars the facts on which he relies to prove such justification, and he can obtain discovery only in respect of such facts so stated."

In *Bullen v. Templeman* (1896), 5 B.C.R. 43, it was held by the full Court, overruling Walkem, J., "that in an action of libel a defendant who has pleaded a general justification must furnish the plaintiff with the particulars of the facts relied on as a justification before he can obtain discovery from the plaintiff."

Mr. McKay contended that the plaintiff was bound to make affidavit of denial before she was entitled to call upon the defendant for particulars, and referred to *Murray v. Brown* (1894), 16 P.R. 125, and *Bank of Toronto v. Insurance Co. of North America* (1897), 18 P.R. 27. I do not think these cases are applicable here. The point here is that the pleadings are not complete without a statement of the facts to support the general plea, or, if the statement of facts does not appear in the plea, particulars should be given, and until these particulars have been given there should be no order for discovery. This clearly appears in the cases above cited.

Mr. McKay also referred to *Hooton v. Dalby*, [1907] 2 K.B. 18; *A. v. B.* (1903), 7 O.L.R. 73; and *Townsend v. Northern Crown Bank* (1909), 19 O.L.R. 489. I have examined these cases, and I do not think any of them militate at all against the rule above laid down as to the form of pleading and particulars in a case like the present.

The order below should be varied and particulars be given of the facts upon which the defendant relies to support his plea of justification; and, until such particulars are given, the defendant is not entitled to examine the plaintiff for discovery.

The plaintiff is entitled to the costs of this motion and of the motion in Chambers in any event of the cause.

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On the 14th January, 1918, particulars were delivered by the defendant as follows:—

1. The plaintiff was and acted as a common whore and prostitute at the city of Toronto, in the county of York, at a house known as number 464 Church street, in the city of Toronto, and at the King Edward Hotel, at a building known as the Arlington Hotel, at a building known as the Halfway House, situate on the Kingston road at a distance of about 14 miles from the city of Toronto, on a number of occasions prior to the 15th day of May, 1916, in that the said plaintiff at said places and during the said period for some time prior to the 23rd day of August, 1916, had sexual connection with different men for remuneration.

2. At some time about the middle of August, 1916, the plaintiff left the city of Toronto and went to Boston Creek, in the district of Temiskaming, and, while at Boston Creek aforesaid and various places in the said district of Temiskaming, had sexual connection with men other than her husband; and said plaintiff, now having returned to the city of Toronto, continues to be engaged as previously in the same occupation.

Upon the plaintiff's application, after the delivery of these particulars, the Master in Chambers made an order requiring the defendant to give further and better particulars.

The defendant appealed from the Master's order, and at the same time moved for a postponement of the trial.

January 22. The appeal and motion were heard by MIDDLETON, J., in Chambers.

R. McKay, K.C., for the defendant.

J. M. Ferguson, for the plaintiff.

January 28. MIDDLETON, J.:—The particulars given are not, as they stand, a compliance with the order made, and the better course is to set them aside with liberty to give new particulars within a week.

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If the defendant intends to shew that the plaintiff acted as a common whore and a prostitute, giving access to all comers, it may well be that this is stated with sufficient particularity when the place and time are given, but the allegation should then be in such form as to cast the onus on the defendant of proving this misconduct during the whole of the period charged.

If the immorality relied upon is misconduct with individual men, the dates, places, and names should be given; and, where in any case these exact particulars cannot be given, the defendant should state under oath that the particulars given are the best that he is able to give upon information he now has.

This is important because the plaintiff is entitled to know enough to enable her to defend herself against the charges made, and she may be able to do this, if adequate particulars are given, by shewing an *alibi* on the part of the man charged or of herself—or possibly by securing the evidence of the man to shew his innocence. It by no means follows that the men named will be witnesses for the defence.

For the order of the Master I substitute a general order setting aside the particulars delivered, with liberty to the defendant to deliver new particulars within a week, such particulars to be verified by the oath of the defendant that these are to the best of his belief true and as full and accurate as he can make them in view of the knowledge he now has.

If the defendant does not accept this, then I leave him to his fate, as he has not complied with the order made on the 15th December, 1917.

Costs to the plaintiff in the cause—i.e., of the appeal.

The trial must be postponed, as the action cannot well be ready for trial during the present sittings. The costs of this motion in the cause.

[IN CHAMBERS.]

1918

Jan. 28.

HENSTRIDGE V. LONDON STREET R.W. CO.

Costs—Taxation—Fee for Solicitor Attending Trial—Per Diem Allowance Fixed by Tariff (Item 14)—Computation of “Day”—Separate Actions Tried together—Separate Fee in Each.

Item 14 of the tariff of costs provides that the fee allowed to a solicitor attending the trial of an action is \$20, but, “if the trial lasts more than one day, then for each additional day \$20.”—

Held, that where the trial began at 3 p.m. on a Monday, was continued on Tuesday, and concluded before 3 p.m. on Wednesday, the allowance should be for two days only: the unit of “a day” begins at the hour when the trial begins and ends 24 hours thereafter.

Held, also, that where two actions are tried together, the same solicitor appearing in both, the fee of \$20 a day, fixed by the tariff, should be allowed in both actions.

AN appeal by the defendants from the ruling of a local officer upon taxation of the costs of two actions, brought respectively by a mother and daughter, who were hurt in the same accident, and sued the defendants for damages for their respective injuries. The actions were brought in the Supreme Court of Ontario, and each of the plaintiffs recovered with costs an amount within the County Court jurisdiction. The plaintiffs’ costs were taxed on the County Court scale, and the defendants’ excess costs on the Supreme Court scale. The appeal was in regard to the amount taxed to the defendants for the attendance of their solicitor at the trial, the two actions having been tried together.

January 25. The appeal was heard by MIDDLETON, J., in Chambers.

H. S. White, for the defendants.

E. C. Cattnach, for the plaintiffs.

January 28. MIDDLETON, J.:—There were two actions by a mother and a daughter hurt in a common accident. They sued separately, and each recovered an amount within the County Court jurisdiction. No order was made to prevent set-off.

The appeal concerns one matter only—the allowance to the defendants’ solicitor in the set-off bill for attending at the trial.

The trial began at 3 p.m. on a Monday and lasted till noon on the following Wednesday. The taxing officer has ruled that the

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trial lasted three days, and has allowed the solicitor \$60, holding that this must be apportioned between the two cases or can only be allowed in one because the cases were tried together.

I do not think he is right in either ruling.

Under item 14, the fee allowed to a solicitor attending trial is \$20, but, "if the trial lasts more than one day, then for each additional day \$20."

A trial which begins at 3 p.m. on Monday has not lasted a day until 3 p.m. on Tuesday, and has not lasted more than two days when concluded before 3 p.m. on Wednesday. It was not the intention to give a solicitor a double fee because of the mere accident that a case began just before the Court rose for the day. The unit of "a day" may vary as to the actual number of hours the Court may sit, but it begins at the hour the case starts and ends 24 hours thereafter.

But the fact that two cases were being tried together does not prevent the solicitor charging the fee in each. Where the quantum of the fee is discretionary, this is an element to be considered; where the fee is fixed, the fee provided must be allowed: *Price v. Clinton*, [1906] 2 Ch. 487; *Petrie v. Guelph Lumber Co.* (1885), 10 P.R. 600.

The result is that there should be allowed to the solicitor \$80 in all; and, as \$60 has been taxed in one action, I allow only \$20 more.

No costs.

[APPELLATE DIVISION.]

1918

Jan. 28.

HARRISON v. HARRISON.

Husband and Wife—Alimony—Action for—Defence—Award of Alimony by Arbitrators—Acceptance of Alimony Payments by Wife—Waiver—Bar to Action—Objections to Award—Right of Wife to Contract.

The judgment of MASTEN, J., 41 O.L.R. 195, affirmed.

AN appeal by the plaintiff from the judgment of MASTEN, J., 41 O.L.R. 195.

January 28. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

Gideon Grant, for the appellant. The matters in question in this action were not a proper subject for arbitration, and were not within the scope of the Arbitration Act, R.S.O. 1914, ch. 65. The award was not made in the time provided by the agreement under which the arbitration was held. There was no clause in the submission giving the arbitrators the power to extend the time. There was no consideration for the agreement of the parties to the extension of the time. At common law a woman could not submit to arbitration at all. Nor has that disability been cured by any statute: Halsbury's Laws of England, vol. 1, para. 943. The arbitrators have no power to extend the time: Russell's Law of Arbitrations, 9th ed., p. 116. [MULOCK, C.J. Ex.:—But the plaintiff accepted payments under the new arrangement.] Where the time is extended verbally, it is only a parol submission: *Ryan v. Patriarche* (1906), 13 O.L.R. 94; *Reade v. Dutton* (1836), 2 M. & W. 69. The alteration of the terms of a submission in writing must be in writing if the terms of the Arbitration Act are to be applicable and binding: Halsbury's Laws of England, vol. 1, para. 948; *Smurthwaite v. Richardson* (1863), 15 C.B.N.S. 463. [KELLY, J.:—Did the plaintiff not waive her right to object by appearing at the hearing?] I submit not. If the plaintiff protests upon the hearing, there is no consent: Halsbury's Laws of England, vol. 1, para. 973; *Hamlyn v. Betteley* (1880), 6 Q.B.D. 63. Then there is another point that is fatal to the award. It was not signed by all the arbitrators at the same time and place. The plaintiff has done nothing since to ratify the award. [MULOCK, C.J. Ex.:—She has

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taken money from her husband which she says he should pay her.] We do not admit that the payments were made under an award. On the point that the arbitrators did not sign when together, I refer to *Nott v. Nott* (1884), 5 O.R. 283.

Daniel O'Connell, for the defendant, respondent. All matters in difference between the plaintiff and the defendant and the making provision for the maintenance of the plaintiff were left to arbitration, and an award was made thereunder. The award was final, and the defendant paid to the plaintiff or her agent the alimony awarded her. By accepting these moneys the plaintiff waived her right to bring an alimony action: Halsbury's Laws of England, vol. 16, paras. 883, 901, 902, 903; vol. 1, para. 986.

Grant, in reply.

At the conclusion of the hearing, the judgment of the Court was delivered by MULOCH, C.J. Ex.:—We entertain no doubt as to the proper disposition to make of this appeal. The views of the Bench have been given to counsel as the argument proceeded.

We regard the acceptance of the moneys by the wife as a waiver.

As to the award not having been executed by the three arbitrators at once, there is no evidence upon that point, nor was the point in issue at the trial.

As to the right of the wife to contract, we think that is fully covered by authorities, all of which are very familiar to counsel.

We dismiss the appeal without costs.

[APPELLATE DIVISION.]

1918

SUPERIOR COPPER CO. LIMITED V. PERRY.

Jan. 29.

Writ of Summons—Foreign Defendants—Service of Notice of Writ out of Ontario—Action for Declaration of Right to Make Calls on Company-shares—Rule 25 (1) (h)—“Cause of Action upon a Contract”—“Assets Liable for Satisfaction of Judgment”—Conditional Appearance.

The order of CLUTE, J., 40 O.L.R. 467, refusing to set aside the service of notice of the writ of summons on the defendant S. out of Ontario, was reversed, upon the appeal of that defendant, and the service set aside (MEREDITH, C.J.C.P., dissenting).

The plaintiffs appealed from the same order in so far as it provided that the defendant should have leave to enter a conditional appearance: upon that appeal no order was made except that the plaintiffs should pay the costs of it.

Held, per RIDDELL, J., that a foreigner not resident in Ontario is not subject to the jurisdiction of the Courts of Ontario *prima facie*, and should not be debarred from setting that up, as he would be (so far as Rule 25 is concerned) if he entered the ordinary appearance. If the service out of Ontario were allowed, the order giving leave to enter a conditional appearance should stand.

Under Rule 25 (1) (h), in order that service out of the jurisdiction may be allowed, “a good cause of action against the defendant upon a contract” must be shewn. These words mean the same as the words in the English Rule, “founded on any breach . . . of any contract.” The cause of action here—the plaintiffs claiming merely a declaration that shares in their company held by the defendants were assessable and subject to call—was not founded on a breach of a contract. It was not an action upon a contract at all; that is, it was not an action to enforce a contract or to obtain damages for breach of a contract.

Hughes v. Oxenham, [1913] 1 Ch. 254, followed.

Again, under Rule 25 (1) (h), the defendant must have “assets in Ontario,” of a certain value, “which may be rendered liable for the satisfaction of the judgment”—that is, the judgment to be obtained in the action. It is only such actions as can result in a judgment upon which the “assets in Ontario” can be applied which are in contemplation in this clause. Upon the judgment here sought no assets could be applied. The assets might be applicable for the satisfaction of a judgment for costs; but the costs of the action are not part of the claim in the action nor of “the cause of action.”

Per LENNOX and ROSE, JJ.—Under Rule 25 (1) (h), an order allowing service out of Ontario may be made if (1) it appears that the plaintiff has a good cause of action upon a contract and (2) that the defendant has assets in Ontario which may be rendered liable for the satisfaction of the judgment. The two things must concur. Even if the right to come to the Court (Judicature Act, sec. 16 (b)) for a declaration as to the effect of a contract is a cause of action upon the contract (and *semble* it is not), there could be no assets liable for the satisfaction of a judgment simply declaring the right. The judgment might order the defendant to pay the costs, and the assets could be rendered liable for that part of the judgment; but the plaintiff had no present cause of action for costs, and it was a present cause of action that the Rule required him to shew—some breach of contract which had given rise to a right to have satisfaction out of the defendant's assets.

The defendant was entitled to more than leave to enter a conditional appearance. The facts being admitted, and it being considered that the case did not come within the Rule, the proceedings should be stopped *in limine*.

Per MEREDITH, C.J.C.P.—The action was one “upon a contract;” if the plaintiffs should succeed and have judgment for their costs, the assets would “be rendered liable for the satisfaction of the judgment.” Every person who brings an action of any kind sues for the costs of the action. Costs are as much a part of the judgment as damages. The words “liable for the satisfaction of the judgment” mean “exigible under a plaintiff's execution.” The order refusing to set aside the service should be affirmed.

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The defendant should not have leave to enter a conditional appearance. The dilatory defence raised by the motion to set aside the service should be disposed of *in limine*.

AN appeal by the plaintiffs and also an appeal by the defendant Sutton from the order of CLUTE, J., 40 O.L.R. 467, refusing to set aside the service of notice of the writ of summons on the defendant Sutton out of Ontario, but allowing that defendant to enter a conditional appearance.

Rule 25, the provisions of which are discussed in the argument and judgments, is, so far as material, as follows:—

25.—(1) Service out of Ontario of a writ of summons or notice of writ may be allowed wherever:—

(e) The action is founded upon a judgment or on a breach within Ontario of a contract, wherever made, which is to be performed within Ontario or on a tort committed therein.

(h) Service may also be allowed where the action is for any other matter and it appears that the plaintiff has a good cause of action against the defendant upon a contract or judgment . . . and that the defendant has assets in Ontario, of the value of \$200 at least, which may be rendered liable for the satisfaction of the judgment; . . .

December 5, 1917. The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

A. W. Langmuir, for the plaintiffs, argued that the defendant Sutton should not be allowed to enter a conditional appearance. The question of the jurisdiction of the Court over the person of the defendant should be determined now rather than be left open until the trial. Rule 25 (1) (h) gives the right to serve the writ without Ontario. The action was upon a contract, and the defendant had the necessary assets in Ontario. The assets could be rendered liable to the satisfaction of a judgment for costs in an action for a declaratory judgment.

M. L. Gordon, for the defendant Sutton, contended that the service of the writ should be set aside, because the judgment which could be obtained in this action would be only a declaratory one,

and therefore would not be one to which the assets in Ontario could be applied, as required by Rule 25 (1) (h). These assets could not be applied merely to the costs awarded in such an action. Moreover, this was not an action upon a contract—specific performance or damages was not asked; it was an action to determine whether there was a contract, and so did not come within the Rule: *Colonial Bank v. Cady and Williams* (1890), 15 App. Cas. 267; *Hughes v. Oxenham*, [1913] 1 Ch. 254; *Kolchmann v. Meurice*, [1903] 1 K.B. 534; *Re Canada Cork Co.*, not reported, referred to in Parker's Company Law, p. 390; *Cooper v. Knight* (1901), 17 Times L.R. 299; Annual Practice, 1916, p. 83.

Langmuir, in reply, said that the English cases cited for the defendant did not help him, as under the English Rule the action must be founded upon the breach of a contract, whereas here it is upon a contract.

January 29. RIDDELL, J.:—The plaintiffs, an Ontario company, sue the defendants, who reside in the United States, for a declaration that the shares in the plaintiff company held by the defendants are not paid up but are assessable and subject to call. The defendants each hold certain shares in the plaintiff company, which admittedly are worth more than \$200.

The plaintiffs obtained leave to serve out of the jurisdiction under Rule 25 (h); the Master in Chambers refused to set aside the service; on appeal, Mr. Justice Clute dismissed the appeal, but allowed the defendant Sutton to enter a conditional appearance. By leave, both parties now appeal, the plaintiffs against the permission to enter a conditional appearance, the defendant Sutton against the refusal to set aside the service.

As to the plaintiffs' motion, it seems to me wholly useless; no loss of time or money can accrue from the conditional appearance; and, except that the defendant would be prevented from raising the question as to the right to serve without the jurisdiction, the plaintiffs could gain no advantage from their present appeal. But the question has been raised and must be decided.

I think this appeal cannot succeed. A foreigner not resident in Ontario is not subject to the jurisdiction of our Courts *primâ facie*. I think it is for the plaintiffs to make out conclusively that such a person falls within one of the classes referred to in Rule 25 before

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he can be debarred from setting up that he is not subject to our Courts. If he enter an appearance in the usual form, he is held to have attorned to the jurisdiction (*i.e.*, so far as Rule 25 is concerned), and he cannot set up the objection in his statement of defence or at the trial: *Grocers' Wholesale Co. v. Bostock* (1910), 22 O.L.R. 130; *Tozier v. Hawkins* (1885), 15 Q.B.D. 650, 680, and like cases. Of course this does not conclude the jurisdiction of the Court except the territorial jurisdiction: *Wilmott v. Macfarlane* (1896), 32 C.L.J. 129, 16 C.L.T. Occ. N. 83; but it is conclusive as to territorial jurisdiction.

I see no reason why a foreigner should not be allowed to dispute the jurisdiction, and would dismiss the appeal.

The defendant Sutton contends that this case does not come within Rule 25 (1) (*h*). This provides that service without the jurisdiction "may . . . be allowed where . . . it appears that the plaintiff has a good cause of action against the defendant upon a contract or judgment or in respect of a claim for alimony, and that the defendant has assets in Ontario, of the value of \$200 at least, which may be rendered liable for the satisfaction of the judgment . . ."

This Rule is read with reasonable strictness: *Wheeler v. Wheeler* (1895), 17 P.R. 45; *In re Eager* (1882), 22 Ch.D. 86; *In re Cliff*, [1895] 2 Ch. 21.

Admittedly, there must in this case be "a good cause of action against the defendant upon a contract." I think these words mean the same as the words in the English Rule, "founded on any breach . . . of any contract."

In *Deutsche National Bank v. Paul*, [1898] 1 Ch. 283, it was held that a claim for a declaration that the plaintiffs are entitled to a charge for a named sum, and that the charge may be enforced by foreclosure, is not an action founded on the breach of a contract. In *Kolchmann v. Meurice*, [1903] 1 K.B. 534, it was held that "no power is given by the rules to serve a writ out of the jurisdiction in an action to enforce a charge against personal property in this country:" *per* Stirling, L.J., at p. 537. These are not conclusive in view of the particular facts.

The question came up again in *Hughes v. Oxenham*, [1913] 1 Ch. 254, which was a foreclosure proceeding in respect of a mortgage of personalty by the original mortgagee against the original

mortgagor. This was held not to be founded upon a breach of contract within the meaning of the Rules; Cozens-Hardy, M.R., saying (p. 256): "This is a proceeding in which no relief could be given, or is sought, in the shape of a personal order for payment. . . . Is that an action founded on a breach or an alleged breach of a contract . . . ? I think not." So in the present case I think:

The reasoning in the present case is *â fortiori*: under Rule 25 (1) (h), not only must there be "a good cause of action . . . upon a contract . . ." but the defendant must have "assets in Ontario, of the value of \$200 at least, which may be rendered liable for the satisfaction of the judgment." The "judgment" mentioned here has of course nothing to do with the "judgment" previously mentioned; it means the judgment to be obtained in the action. It seems to me that it is only such actions as can result in a judgment upon which the \$200 of assets in Ontario can be applied which are in contemplation in this clause. The judgment sought in the present action is a mere declaration, upon which no assets could be applied.

But it is said that these assets may be applicable for the satisfaction of a judgment for costs. I have not been so long away from the practice of law that I may despise or affect to despise costs. James, L.J., in *Hall v. Eve* (1876), 4 Ch.D. 341, at pp. 344, 345, said: "This case reminds me of a saying of the late Mr. Jacob, that the importance of questions was in this ratio: first, costs; second, pleadings; and third, very far behind, the merits of the case." But, however important costs may be in themselves, the theory of our law (I do not pause to consider whether this is not in some cases a pleasing fiction) is that they are merely adventitious, not the substantive claim. They may be granted though not mentioned in the statement of claim, and may be refused though expressly claimed. Costs themselves are not regarded as part of the claim at all.

Holding as I do that we must restrict "cause of action" to a cause of action such that the assets might be rendered liable for the satisfaction of the judgment obtained thereon, and seeing that the assets in Ontario cannot be in any fair sense so rendered liable, I think the plaintiffs are not entitled to the help of the Rule.

Moreover, the present action is not really an action against

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the defendants upon the alleged contract at all, but only an action to determine whether there is a contract. An action against any one upon a contract must, in my view, be an action against such person to enforce the alleged contract against him or to obtain damages for its breach.

No injustice, no inconvenience even, will accrue to the plaintiffs from this interpretation of the Rule. There is nothing to prevent them making a formal call on the stock and suing for the amount: why this was not done in the first place does not appear. I would allow the defendants' appeal and set aside the service, with costs here and below.

ROSE, J.:—Rule 25 (1) (*h*) authorises the making of an order allowing service out of Ontario if it appears that the plaintiff has a good cause of action against the defendant upon a contract, and that the defendant has assets in Ontario, of the value of \$200 at least, which may be rendered liable for the satisfaction of the judgment. The two things must concur: it must appear that there is the good cause of action upon a contract; and there must be the assets which may be rendered liable for the satisfaction of the judgment. Now an action is not open to objection on the ground that a merely declaratory judgment is sought thereby, and the Court may make binding declarations of right whether any consequential relief is sought or not: The Judicature Act, sec. 16 (*b*); but you cannot make anything liable for the satisfaction of a judgment which merely declares that certain shares are subject to call: there is nothing to satisfy; so that, even if the right to come to the Court for a declaration as to the effect of a contract is a cause of action *upon* the contract (and I suggest that it is not), the second requirement of the Rule is not met: there are no assets which can be rendered liable for the satisfaction of the judgment. True, the judgment, if in the plaintiff's favour, may order the defendant to pay the costs, and the assets could be rendered liable for that part of the judgment; but the plaintiff has no present cause of action for costs, and it is a present cause of action that the Rule requires him to shew. The expression *cause of action* "is ordinarily considered as involving the combination of a right on the part of plaintiff and a violation of such right by defendant:" *Corpus Juris*, vol. 1, p. 951; and that is the sense in which it appears to me to be

used in this Rule: some breach of contract which has given rise to a right to have satisfaction out of the defendant's assets.

That being my interpretation of the Rule, I think that the order giving leave to effect service out of Ontario ought not to have been made.

Upon the motion of the defendant Sutton to set aside the service, Mr. Justice Clute refused to set aside the service, and gave leave to the defendant to enter a conditional appearance. With great respect, I think the defendant was entitled to more than that. "The power to allow a conditional appearance should only be exercised where it is doubtful if the plaintiff can bring himself within the Rule by reason of the facts being in issue." *Standard Construction Co. v. Wallberg* (1910), 20 O.L.R. 646, 649. Where, as in this case, the facts are admitted, and the only matter to be determined is the meaning of the Rule, it seems to be no more than fair to the parties to settle the matter as early as possible, and, if the order allowing service was unauthorised, to stop the proceedings before the expense of preparing for trial is incurred.

I would set aside the service of the writ and would order the plaintiffs to pay the costs of the motions, and of the appeal.

LENNOX, J., agreed with ROSE, J.

MEREDITH, C.J.C.P. (dissenting):—The appellants (the plaintiffs) are quite within their rights in appealing against the order in question, in so far as it permits the respondent (the defendant Sutton) to enter a conditional appearance: indeed they would be neglectful of their own interests, and, to some extent, the interests and convenience of this Court, if they did not seek to have the preliminary question, which is the subject of this appeal, finally determined now. Nothing could be gained by carrying it down to a trial of the action on its merits, whilst much time and costs might be needlessly wasted, and inconvenience to witnesses and others needlessly caused.

The point in question is whether this Court has, in this action, jurisdiction over the person of the respondent; and it should be obvious that a dilatory defence, such as that, ought to be dealt with *in limine*, if possible: and that it is possible, in this case, is manifest: nothing could be gained by carrying the question down

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to the trial: though, of course, there may be cases in which it is impossible to avoid such a course, conveniently.

The respondent resides just without the jurisdiction of this Court—just across the boundary-line: and the question is, whether the case is a proper one for service, out of Ontario, of a writ of summons, or notice of it, under Rule 25.

The purpose of this action is to have it determined whether the respondent, or his co-defendant, is, or both are, liable to the plaintiffs to pay up 10,000 or 17,790 shares of the capital stock of the plaintiffs, which the defendant Perry at first owned, but which are now owned by the respondent, as is evidenced by the certificate of such ownership obtained by the respondent from the company, dated the 12th November, 1914, and filed in these proceedings.

The appellants are an Ontario company, incorporated under the laws of this Province, and carry on business in the copper mines district of this Province: so that the action is essentially an Ontario action: an action brought upon a contract to take the shares in question, and, if there be any such liability—to pay for them—a contract made, and to be performed, in this Province; and upon a transfer of such shares sought by, and made to, the respondent, in so far as it was made effectual by the company becoming a party to it, in this Province. So that it would seem strange if there were no means provided by which the question involved in this action could be tried in the Courts of this Province, notwithstanding the fact that the respondent happens to reside across the border-line of it.

The appellants rely upon Rule 25 (1), clause (h), as clearly enabling them to serve the writ in this action out of Ontario; and I should have thought, as both the Master and the Judge at Chambers thought, that it does.

Two things are required by it: (1) that the action is upon a contract; and (2) that the defendant has assets in Ontario of the stated value: I mention only the two things over which there has been contention here, not all that the clause requires or covers.

As to the first, I should have thought it manifest that the plaintiffs' action is upon a contract. If not, upon what is it brought? This question was asked early in the argument, but yet remains unanswered by or for the respondent. It is said that all that is sought is a declaratory judgment. But what has that to do with

the question? Is it any the less an action upon a contract because in it is sought only a determination of the question, what are the rights of the parties under their contract, and it is not brought to enforce such rights? If the action were brought against the first subscriber for the shares, could it be said it was not upon a contract? And, if not, what difference can it make that it is against one to whom he has, with the company's assent, transferred his rights and liabilities under his contract?

Some cases decided in the Courts of England were referred to, but I did not understand counsel for the respondent to contend that they are in point here: and it is quite plain that, for two reasons, they cannot aid him in this case. In the first place, they were not actions upon a contract: two of them were to enforce charging orders; and the others to foreclose equities. And in the second place they were based upon a different Rule, worded very differently: there is no such Rule in England as that in question upon this appeal. Under the English Rule, as well as under the Ontario Rule, clause (e), the action must be founded upon a *breach* of a contract; clause (h) is significantly different, it is "upon a contract:" so that under the former an action such as this would not lie, no breach of contract is alleged; but under the latter it does lie, for it is not needful that there should be a breach of the contract upon which the action is brought. Clause (h) is a later addition to this Rule; and, if it had been purposely framed to include an action for a declaration of rights under a contract, it could not have been better worded. And, I may add parenthetically, after the decisions in England, the Rules there were promptly changed so as to embrace all such cases as the Courts excluded.

This point seems to me to present no difficulty. I have no sort of doubt that the Master and the Judge were right in their conclusions as to it. But it is said that this case is not within the second requirement of the Rule. It is admitted that the respondent has assets in Ontario of the value of \$200, at least: so we have not to consider, in any way, that requirement. But it is said that the action must be one for debt or damages, that is, that it must be one for *breach* of a contract, because these words are added to the provision as to the value of the assets in Ontario: "which may be rendered liable for the satisfaction of the judgment." The suggestion was: that effect cannot be given to these words unless the

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action is for damages: but I find no difficulty in giving effect to them; and I am quite sure that, if the plaintiffs should succeed in this action, the respondent here would find that the sheriff would have no difficulty in giving very palpable effect to them. If the plaintiffs succeed and have judgment for their costs, as they should: see *West v. Gwynne*, [1911] 2 Ch. 1: not only "might" the assets "be rendered liable for the satisfaction of the judgment," but a practical demonstration of so satisfying the judgment would certainly follow, if the assets were not saved by prior payment of the judgment for costs. It is said that the plaintiffs might not be awarded their costs; but, so too if the action were for damages, the plaintiffs might not be awarded any damages. What has that to do with the question? The assets are to satisfy the judgment only when there is a judgment, not when the plaintiff fails. To say that one has no right under this clause because he has no right of action for costs when the action is begun, seems to me like saying that no one has a right under the clause because he has not a judgment in the action before it is begun; besides being inaccurate in fact, for every person who brings an action of any kind has not only an action for costs but also sues for them—that is, the costs of the action, costs which are claimed in the writ and at every stage of the action.

It is quite erroneous to speak of costs as no part of the judgment: they are quite as much part of the judgment as damages, and recoverable under the judgment in the same manner. "Costs are in the nature of damages, although they cannot now be awarded as such by the jury." "There is in principle no ground of distinction between a judgment for costs and for a pre-existing debt or damages. It is equally a judgment for money, which it requires the same means to pay." *Encyclopædia of Pleading and Practice*, vol. 5, pp. 108-109. And none of us should be so young as never to have known, or so old as to have forgotten, the familiar form of common law judgment: "Therefore it is considered that the plaintiff do recover against the defendant the said debt of £ and the moneys by the jurors in form aforesaid assessed, and also £ for his costs of suit by the Court here adjudged of increase to the plaintiff, which said debt, damages, and costs in the whole amount to £ : " and that no distinction is made between damages and costs, even at the present day, regarding the right to recover them by writ of execution: Rule 533.

So, too, to give effect to this suggestion would lead to this absurdity: a judgment for costs made in Ontario would not be a "judgment" within the meaning of clause (h), but a judgment for costs made in Michigan, or anywhere else out of Ontario, would be; that is to say, that in order to reach assets in Ontario to satisfy a judgment for costs, in such a case as this, the plaintiffs must first sue the respondent in Michigan, or elsewhere out of Ontario, and then come back and sue in Ontario for the recovery of the foreign-made costs.

What the words plainly seem to me to mean is, exigible under a plaintiff's execution, not goods exempt from execution, or otherwise not liable for the satisfaction of the judgment. No suggestion has been made, and I can make none, of any kind of reason for excluding an action such as this: so again I am obliged to protest against giving to the words of the law an unreasonable interpretation when they are just as capable of a reasonable interpretation. I say an unreasonable interpretation not only because it has so seemed to be throughout this appeal, but also because of no response to the question: what reason could there be for excluding an action for the interpretation of a contract whilst including an action for a breach of the same contract? Or for making any difference between a judgment for debt or damages, which might be for a farthing, and for costs, which are hardly likely to be less than \$200?

It is no answer to that question to say: the plaintiffs should have made a call upon the stock in question and have sued for it; that is entirely beside the question; and may well provoke the reply: that is our business, let us each stick to our own last. There may be various good reasons for having the question of liability first determined: the amount of the call may depend upon it: and, if no stockholder be liable, there would be no sense, and there might be much foolishness, in making a call. All these things are for the consideration of the company, who are doubtless quite competent to deal with them; and, whether or not, it is entirely their business. The respondent has pointedly raised the questions of: (1) any liability at all; and (2), if general liability, whether he is personally exempt.

I decline to turn the words "satisfaction of the judgment" into "satisfaction of the debt or damages," as really we must if we

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exclude a judgment for costs: and the more so as, here again, the change in the wording of this later clause from that of the early one, from actions on "a breach of a contract" to actions "on a contract" is very significant; and the more so as the present statutory jurisdiction regarding declaratory judgments is a thing of not very far-distant introduction.

Another circumstance, not before referred to, may be mentioned. Clause (*h*) was originally introduced by legislation—in the Judicature Act of 1895; and then, and for some years after, it contained words which really indicated that it covered only actions for the recovery of debt or damages—declaratory judgments had not then come into so much vogue; but those words were subsequently eliminated; the elimination being not only in itself significant of the direct widening of the Rule thereby caused, but significant, also, because it was so widened when the wider jurisdiction regarding declaratory judgments was coming into use.

I am therefore in favour of allowing the appeal of the plaintiffs and of dismissing the appeal of the defendant Sutton.

But I must add that all this litigation seems to be a waste of time and money, when the respondent can—doubtless frequently—be served within Ontario—whenever he happens to step across the border-line—from "Soo City" in Michigan to "Soo City" in Ontario.

Result: appeal of the defendant Sutton allowed and the service upon him set aside; on the plaintiffs' appeal, no order made except that the plaintiffs pay the costs; costs of the original motion and appeals to be paid by the plaintiffs.

[MIDDLETON, J.]

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RE CARTER.

Will—Bequest of Fund to Provincial Treasurer—Permanent Endowment of Charity—Income to be Paid over in Perpetuity—Legal Effect—Gift of Corpus to Charity—Trustee—Ontario Statutes 9 Edw. VII. ch. 26, sec. 42: 10 Edw. VII. ch. 26, sec. 47; 5 Geo. V. ch. 20, sec. 25.

C., who died in 1913, by his will made in 1910, directed that all his estate, save that specifically dealt with, should be converted by his executors, and the proceeds paid to the Provincial Treasurer, under the provisions of the Ontario statute 9 Edw. VII. ch. 26, sec. 42, as amended by 10 Edw. VII. ch. 26, sec. 47, "for the permanent endowment of . . . a charitable object as hereinafter directed" and "shall be so paid for the purpose of being invested by him in Ontario Government stock as by the aforesaid Acts directed and the whole of the interest thereon shall be paid over as it matures in perpetuity to the Hospital for Sick Children:"—

Held, that the gift of the income in perpetuity, without any restriction as to the purpose for which it was to be used, was in effect and in law a gift of the corpus.

Mayor etc. of Beverley v. Attorney-General (1857), 6 H.L.C. 310, 318, followed. The intention of the testator must always be the guide in the interpretation of wills; but, when once the intention is clear, the legal effect of that intention must follow even if it could be shewn that the testator did not know the effect in law of what he had directed.

The statutes (since repealed and re-enacted in amended form by 5 Geo. V. ch. 20, sec. 25) merely constituted the Treasurer a trustee—the effect of the trust declared must be ascertained upon the ordinary principles.

MOTION by the executors of the will of James Irving Carter, deceased, for an order determining a question as to the meaning and effect of the will.

January 23. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

A. Weir, for the executors.

R. H. Parmenter, for the Hospital for Sick Children.

J. T. White, for the Treasurer of the Province of Ontario.

January 30. MIDDLETON, J.:—James Irving Carter died on the 2nd November, 1913, having made his will on the 29th July, 1910, which was duly proved on the 1st December, 1913.

After certain specific devises and bequests, he directs that all his estate, save that specifically dealt with, shall be converted by his executors, and the proceeds paid to the Treasurer of the Province, under the provisions of the statutes of Ontario, 9 Edw. VII. ch. 26, sec. 42, as amended by 10 Edw. VII. ch. 26, sec. 47.

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“for the permanent endowment of an educational object and a charitable object as hereinafter directed.”

The sum of \$100,000 is directed to be used to provide for scholarships to be awarded at the matriculation examinations, and no question now arises as to this sum, which has been paid over.

The remainder of the residuary estate to be paid to the Provincial Treasurer, which will amount to about \$30,000, “shall be so paid for the purpose of being invested by him in Ontario Government stock as by the aforesaid Acts directed and the whole of the interest thereon shall be paid over as it matures in perpetuity to the Hospital for Sick Children situate on the south side of College street in the city of Toronto and now presided over by Mr. John Ross Robertson.”

The statutes referred to provide: “The Provincial Treasurer may accept from any person gifts or bequests for the permanent endowment of any charitable or educational object in Ontario, and invest the same in ‘Ontario Government stock’ bearing four per cent. interest payable half-yearly in the case of a charitable object and five per cent. interest payable half-yearly in the case of an educational object. The stock shall be held in the case of a charitable object in the name of the Provincial Treasurer and of the Provincial Secretary in trust for the charity for which the same is given or bequeathed, and in the case of an educational object in the name of the Provincial Treasurer and of the Minister of Education for the time being in trust for the educational object for which the same is given or bequeathed, and the interest shall be paid half-yearly to the officer or person designated by the donor.”

Since the death of the testator this legislation has been repealed and re-enacted in an amended form by 5 Geo. V. ch. 20, sec. 25.

Under the amended enactment, the Treasurer may accept gifts and bequests “for the permanent endowment of any charitable or educational object in Ontario, and may invest the same in such securities as the Lieutenant-Governor in Council may direct,” and interest is directed to be paid, at the rates mentioned, out of the Consolidated Revenue Fund.

I am not now concerned with the question whether the original or amended Act governs. For the purpose in hand there is no material difference.

The Sick Children's Hospital contends that the ordinary rule

applies; and that, as there is here a gift of the income in perpetuity, it is in effect and in law a gift of the corpus.

The executors take the position that to give effect to this rule would frustrate the intention of the testator, which was that in perpetuity there should be an annual payment to this charity from this fund.

Clearly the testator never contemplated payment to the trustees of the hospital, because he has directed the fund to be held under the statute; but that, it seems to me, is not enough. If the legal consequence of what he has done is to make an actual gift to the charity, that consequence must follow even though it was not appreciated by the testator. The intention of the testator must always be the guide in the interpretation of wills; but, when once the intention is clear, the legal effect of that intention must follow even if it could be shewn that the testator did not know the effect in law of what he has directed.

Here, in plain and unambiguous language, there is a gift to this charity of the income of this fund in perpetuity. Ever since the days of Lord Coke it has been clear that in law this is a gift of the fund itself. This rule applies to both the income of land and the income of personal estate.

In *Mayor etc. of Beverley v. Attorney-General* (1857), 6 H.L.C. 310, 318, the Lord Chancellor speaks of "the well-known principle that if I give all the rents of my estate for ever, I in truth give my estate."

The will here gives this income to the hospital without any restriction as to the purpose for which it is to be used. If there had been any restricted purpose mentioned, there would have been an obligation to maintain the fund for the purpose pointed out. For example, when the gift was to an hospital "to found a bed to be called" etc., the fund was directed to be invested and the income only used for maintaining the bed.

I have searched anxiously to find any trace of an exception to the general rule in the case of gifts to charity, but I can find none.

Of course, where the income from a fund is directed to be applied from time to time for the benefit of a class which may vary from year to year, quite different considerations will apply. Here the hospital as a corporation is the sole beneficiary.

The order will therefore declare that the hospital is entitled to

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receive the fund from the executors; and, as it is so entitled, it may, if so advised, take the estate as it is without waiting for the conversion of the remaining assets. No one else has or can have any interest.

I should have mentioned that the statutes do not appear to me to make any difference—they merely constitute the Treasurer a trustee, and the effect of the trust declared must be ascertained upon the ordinary principles.

Costs of all parties out of the estate.

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Jan. 30.

[MIDDLETON, J.]

ENGLAND V. LAMB.

Executors and Administrators—Action by Administrator to Recover Damages for Death and Funeral Expenses of Intestate—Claim not within Fatal Accidents Act—Trustee Act, R.S.O. 1914, ch. 121, sec. 41—Cause of Action.

Where the death of a person was occasioned, as alleged, by the negligence of the defendant, it was *held*, that an action by the administrator of the estate of that person to recover money paid for funeral expenses and “damages for the death” would not lie.

The action could not be maintained under the Fatal Accidents Act, R.S.O. 1914, ch. 151, the relatives who survived the deceased not being within the limited class mentioned in sec. 4 (1).

Nor could the action be brought by virtue of sec. 41 of the Trustee Act, R.S.O. 1914, ch. 121, which is intended to prevent the wrongdoer escaping liability by reason of the death of the person injured, and does not create a new right of action. Before that enactment, the death of a person injured from any cause put an end to the action—*Actio personalis moritur cum personâ*.

Even if that maxim is now abolished, save as to actions of libel and slander, as said in *Mason v. Town of Peterborough* (1893), 20 A.R. 683, 685, 686, the principle that, in a civil court, the death of a human being cannot be complained of as an injury, laid down in *Baker v. Bolton* (1808), 1 Camp. 493, and affirmed in *Admiralty Commissioners v. S.S. Amerika*, [1917] A.C. 38, remains untouched.

MOTION by the defendant for an order dismissing the action, on the ground that the statement of claim disclosed no cause of action.

January 21. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

F. H. Snider, for the defendant.

M. Wilkins, for the plaintiff.

January 30. MIDDLETON, J.:—On the 21st October, 1917, it is said, the defendant, while driving his automobile in Queen street, in the city of Toronto, negligently “ran into” the late “George England and killed him almost instantly.”

The plaintiff, on the 21st December, 1917, was appointed administrator of England, and on the next day began this action, claiming to recover: the funeral expenses, \$148; “\$100 for time, trouble, and other expenses in connection with the death and burial of the said George England;” and “\$2,000 damages for the death of the deceased George England.”

The plaintiff is one of three brothers of the deceased, who also left two surviving sisters.

There is an allegation that the defendant promised to pay the said expenses, i.e., the \$248. No particulars are given as to this; but, on the argument, the plaintiff’s counsel admitted that what is relied upon took place before the plaintiff’s appointment. The suit is by the plaintiff in his capacity as administrator.

This supposed promise can avail nothing, not merely for this reason, but because there was no consideration.

The action, it is admitted, cannot be maintained under Lord Campbell’s Act, for the survivors are not within the limited class named in it*

What is asserted is, that the action can be brought by virtue of sec. 41 of the Trustee Act, R.S.O. 1914, ch. 121, which enables the administrator of a deceased person to maintain an action “for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do.”

This statute was passed to prevent the wrongdoer escaping liability by reason of the death of the person injured, and not for the purpose of creating a new right of action.

Obviously no person, if living, could maintain an action by reason of his death or for his funeral expenses.

Before the statute, the death of the person injured from any cause put an end to the action. This rule is embodied in the familiar maxim, “*Actio personalis moritur cum personâ.*”

* See the Fatal Accidents Act, R.S.O. 1914, ch. 151, sec. 4 (1): “Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death . . .”

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Even if this maxim is now abolished, save as to actions of libel and slander, as stated by Osler, J.A., in *Mason v. Town of Peterborough* (1893), 20 A.R. 683, at pp. 685, 686, this leaves unaffected the great obstacle in the plaintiff's way, the principle laid down by Lord Ellenborough in *Baker v. Bolton* (1808), 1 Camp. 493: "In a civil court, the death of a human being could not be complained of as an injury."

This principle has been placed beyond controversy by the recent case of *Admiralty Commissioners v. S.S. Amerika*, [1917] A.C. 38, where it is affirmed by the House of Lords.

The doubts in the minds of some as to the existence of this rule of law, occasioned by the dissenting judgment of Lord Bramwell in *Osborne v. Gillett* (1873), L.R. 8 Ex. 88, are thus finally set at rest: and the view of the majority must be accepted as law. See also the decision of the Court of Appeal in *Clark v. London General Omnibus Co.*, [1906] 2 K.B. 648.

For these reasons, the action must be dismissed with costs

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[MIDDLETON, J.]

Jan. 31.

RE JONES.

Will—Perpetual Trust for Care of Grave—Legislative Sanction—Cemetery Act, R.S.O. 1914, ch. 261, secs. 2 (c), 14.

A direction in a will to the executors to deposit a sum in a bank or invest it, "the yearly interest to be devoted to the care of my grave," creates, leaving statutory provisions out of consideration, a perpetual trust; and, as the purpose is not charitable, is void; but legislative sanction is given to this particular form of perpetual trust, by the Cemetery Act, R.S.O. 1914, ch. 261, sec. 14, especially sub-sec. 4; and, where there was such a direction in a will, it was declared that the executors might pay over the sum mentioned to the "owner," i.e., the person owning, controlling, or managing a cemetery (sec. 2 (c)), making an agreement with him as contemplated by the statute.

MOTION by the executors of the will of one Jones for an order determining a question as the disposition of a part of the estate.

January 23. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

J. H. Naughton, for the applicants.

January 31. MIDDLETON, J.:—Under the will the executors are “to retain \$500 to be deposited in a chartered bank or invested in sound securities, the yearly interest to be devoted to the care of my grave.”

Apart from statutory provisions, this creates a perpetual trust; and, as the purpose is not charitable, it is void. This has been established by many decided cases.

But, by the Cemetery Act, R.S.O. 1914, ch. 261, sec. 14, the “owner” of a cemetery may receive by bequest any money “in consideration of assuming and undertaking the duty and obligation of preserving and maintaining in a proper manner in perpetuity any particular lot, tomb, monument or enclosure in such cemetery,” and any person may make such bequest upon such condition and for such consideration.

If this stood alone, it would not apply, for it contemplates a gift to the owner of the cemetery.

But sub-sec. 4 is more far-reaching. It provides: “Personal representatives or trustees may pay over and transfer money or securities in their hands which they are authorised or directed to apply for or toward the purposes mentioned in this section.”

Sub-section 5 provides that the money paid is to be invested in trustee securities, and the income is to be used by “the owner” to perform his obligations.

I read sub-sec. 4 as applying to all money in the hands of the executors which they are authorised or directed to apply for or toward the purposes mentioned in the section—i.e., the maintenance of any particular cemetery lot in perpetuity.

Thus legislative sanction is given to this particular form of perpetual trust.

The executors may pay over the \$500 to the “owner,” i.e., “the person (or persons) owning, controlling or managing a (the) cemetery” (sec. 2 (c)), and should make an agreement with him or them as contemplated by the statute.

Judgment accordingly. Costs out of the estate.

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[IN CHAMBERS.]

Feb. 1.

RE BANKS.

Insurance (Life)—Policy Payable to Wife—Foreign Divorce Obtained by Wife—Invalidity of Divorce—Right of Wife to Assert—Change of Beneficiary by Will—Right to Divert Fund to Beneficiaries not of Preferred Class—Wife Ceasing to be of Preferred Class.

B. obtained a policy of insurance on his life, payable to his wife by name. Some time after the date of the policy, she obtained a divorce in a foreign State. By his will, B. gave one-third of the insurance money to his son and one-third each to his brother and sister:—

Held, that it was not open to the wife, after the death of B., to maintain that the divorce was invalid.

Swaizie v. Swaizie (1899), 31 O.R. 324, and *In re Williams and Ancient Order of United Workmen* (1904), 14 O.L.R. 482, followed.

Held, also, that when she obtained the divorce she ceased to be in law B.'s wife, and so ceased to be within the preferred class; and B. might, at his will, divert to one not of the preferred class, and so effectively exclude the wife, although the divorce alone would not exclude her.

MOTION by the widow of William Banks, deceased, for payment out of Court of moneys representing an insurance upon the life of the deceased.

January 24. The motion was heard by MIDDLETON, J., in Chambers.

W. Lawr, for the widow.

J. A. O'Brien, for persons claiming under the will of the deceased.

February 1. MIDDLETON, J.:—On the 22nd August, 1893, the deceased obtained a policy for \$1,000 payable to "Lillie May Banks, wife."

The insured died on the 2nd August, 1917, and by his will gave one-third of this insurance money to his son, one-third to his brother, and one-third to his sister.

The right of the son to his third is not disputed, but the wife contests the right of the brother and sister—as they are not within the class of preferred beneficiaries

The wife, some time after the date of the policy, left her husband and obtained a divorce in Chicago. She now suggests that this divorce is not valid. I do not think this is open to her: *Swaizie v. Swaizie* (1899), 31 O.R. 324; *In re Williams and Ancient Order of United Workmen* (1907), 14 O.L.R. 482.

When she obtained the divorce, she ceased to be in law the wife, and so ceased to be within the preferred class; and so the insured might, at his will, divert to one not of the preferred class.

The divorce alone would not defeat the wife's right; but the subsequent will, I think, is operative, for the reasons given.

The money must go as directed by the will. No costs.

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Feb. 2.

WATSON V. TORONTO HARBOUR COMMISSIONERS.

Municipal Corporations—Expropriation by City Corporation by By-law of Land for Park Purposes—Municipal Act, 1903, sec. 576 (1)—Conveyance of Land to Harbour Commissioners—Control Retained by City Corporation—Bona Fides—Agreement Validated by 5 Geo. V. ch. 76 (O.)—Extended Area of City—Defect in Proclamation of Lieutenant-Governor—Misdescription of Land—Surplusage—Remedy by 6 Geo. V. ch. 96, sec. 2 (O.)—Validity of By-law—Waiver—Estoppel—Costs.

By a by-law passed on the 12th June, 1911, the council of a city expropriated lands of the plaintiff (two water-lots) and other lands "for park purposes." The defendants, the Board of Harbour Commissioners of the city, were incorporated in 1911 by a Dominion Act; by an Ontario Act, passed in the same year, the city corporation was authorised to convey lands to the defendants; and, by a deed in fee simple, the city corporation conveyed to the defendants two water-lots and other lands, the defendants, upon their part, covenanting not to sell, convey, lease, or mortgage, without the approval and consent of the city council. The defendants took possession and began to fill in the water-lots. The plaintiff, by this action, sought to recover possession of the water-lots, alleging that the by-law was inoperative and invalid. An arbitration had been begun to determine the value of the water-lots with a view to compensating the plaintiff, and \$50,000 had been paid by the city corporation to the plaintiff on account of the compensation:—

Held, that the by-law was passed in pursuance of a well-considered, definite plan for park extension and construction, in the *bonâ fide* exercise of the powers conferred by sec. 576 (1) of the Municipal Act, 1903, and with the intention of administering and permanently using this and other land embraced in the park area for the purposes in that section defined; that the city council did not abandon its purpose or lose its control by the conveyance to the defendants, and was bound to make good the title it purported to convey in pursuance of a combined scheme of park and harbour improvements; that the two water-lots and the other lands in the neighbourhood were not required for and could not be utilised for harbour development or improvement is a commercial sense; that, before and at the time of the execution of the conveyance to the defendants, it was intended by the parties thereto that the city corporation should retain or resume effective control of these lots and other lands as park lands, and that this purpose was effectively secured by an agreement executed on the 26th November, 1914, and validated by the Ontario Act 5 Geo. V. ch. 76; that, if the by-law was invalid or inoperative by reason of a defect (and *semble* there was no substantial defect, for certain words might be rejected as surplusage) in the proclamation of the Lieutenant-Governor defining the ex-

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tended area of the city, made in 1903, the defect had been remedied by the Ontario Act 6 Geo. V. ch. 96, sec. 2; that the plaintiff's lots were therefore properly located and described in the by-law, and legally expropriated; and, at all events, that, after all that had occurred and been done, to the knowledge and with the concurrence of the plaintiff, including possession and expenditure of money upon the property, the plaintiff could not now be heard to object.

Held, also, that, while the action should be dismissed, the defendants should not recover costs from the plaintiff; for the agents of the city council, by a series of blunders, had afforded some excuse for the litigation; and the defendants and the city corporation were substantially the same body.

AN action for the recovery of possession of land, tried by LENNOX, J., without a jury, at Toronto.

J. W. Bain, K.C., Peter White, K.C., and M. L. Gordon, for the plaintiff.

A. C. McMaster and J. H. Fraser, for the defendants.

February 2. LENNOX, J.:—This is an action of ejectment, brought to recover possession of two water-lots just east of the Humber river and south of the Lake Shore road, in the city of Toronto. The paper-title under which the plaintiff claims is not in dispute. The Municipal Council of the City of Toronto, on the 12th June, 1911, passed a by-law—No. 5755—expropriating these and other lands on the lake-front and south of the Lake Shore road “for park purposes.” The by-law is also intitled: “A By-Law to acquire certain Lands on the Lake Shore, south of the Lake Shore Road, in the City of Toronto, for Park Purposes.”

By by-law 5778, passed on the 6th July, 1911, the City Engineer and other officials, servants and agents, of the municipality are directed to enter upon and take and use this land for park, playground, and other purposes. The two lots are combined in one description, and the description evidently includes a narrow strip between the water's edge and the Lake Shore road. This seems to give a few feet greater depth at the north than was covered by the patents of the water-lots, but I am not aware that anything turns upon this. If, as I understand to be the case, the plaintiff owns this strip, it is expropriated; if he does not, the city corporation would probably, under an arbitration, pay for a little more land than it gets title to.

The Harbour Commissioners were incorporated in 1911, by 1 & 2 Geo. V. ch. 26 (D.) By an Ontario Act respecting the

City of Toronto, 1 Geo. V. ch. 119, sec. 4, in the same year, the city corporation was authorised to convey lands to the Commissioners; and, by a deed in fee simple, bearing date the 26th December, 1911, conveyed these and many other parcels of land along the water-front, and in the harbour, to the defendant corporation. The deed contains the usual statutory covenants; and, on the other hand, the Harbour Commissioners covenant, upon their part, not to sell, convey, lease, or mortgage, etc., the land conveyed without the approval and consent of the municipal council.

The Harbour Commission is composed of five members: three are appointed by the city council; one is the direct representative of the Dominion Government; and one is appointed by the Dominion Government on the nomination of the Board of Trade.

The first Board took office in August, 1911; the term of office is three years, and they can be reappointed. They serve without remuneration.

On the 11th November, 1912, the city council passed another by-law, No. 6269, expropriating other lands of the plaintiff to the north of the lands in question; and, the question of compensation under the two by-laws having been duly referred to and taken up by P. H. Drayton, Esquire, Official Arbitrator, it was arranged, with the concurrence of the counsel on both sides, to hear evidence and determine the question of compensation as to all the properties at the same time—Mr. Fairty being counsel for the Corporation of the City of Toronto, and the late Mr. James Bicknell, K.C., for the land-owner, the plaintiff in this action. This was on the 26th August, 1914.

From statements of counsel, I understand that, so far as the evidence upon the reference shews, it proceeded without any question being raised as to the sufficiency of the by-law, the location or description of the water-lots, the boundaries of the City of Toronto, or the regularity of the proceedings during Mr. Bicknell's lifetime, and until March or April, 1915.

The reference as to the land expropriated by the second by-law has been concluded, and no question arises as to it; it has not been concluded as to the water-lots, the subject of this action; and it is contended by counsel for the plaintiff that it cannot be further proceeded with; that by-law 5755 is inoperative and invalid; that the defendants are wrongfully in possession; and that

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neither this by-law, the proceedings taken under it, nor the payment hereinafter referred to, bars his right to recover possession.

The main questions for decision are:—

1. Was by-law 5755 passed in the *bonâ fide* exercises of powers conferred by sec. 576 (1) of the Consolidated Municipal Act, 1903, “For entering upon, taking and using and acquiring so much real property as may be required for the use of the corporation, for public parks, squares, boulevards, and drives in the municipality and adjoining local municipalities, without the consent of the owners of such real property, making due compensation,” etc., or was it merely a colourable scheme or device adopted for the purpose of acquiring the land for and vesting it in the defendant corporation for harbour development and commercial and utilitarian purposes only, and with the object of determining the compensation to be paid therefor by a method not open to the Harbour Commission?

2. Was the by-law 5755 invalid or inoperative by reason of a defect in the Proclamation of the Lieutenant-Governor defining the extended area of the City of Toronto, made in 1903, and, if so, has this been remedied by the Ontario Act of 1916 (respecting the City of Toronto), 6 Geo. V. ch. 96, sec. 2?

3. If the defect existed in the Proclamation and has not been cured by the Act, is the plaintiff—having actual knowledge, as he had, of the alleged defect—estopped or precluded from objecting, by failure to give notice before entering upon the reference, or by express waiver after the reference was commenced, or by applying for and obtaining a payment on account of the total compensation to be awarded, or by any other act or circumstance?

As to the first question—the purpose of expropriation, involving as it does the question of good faith—the plaintiff does not mince matters. He distinctly charges that the action of the council in passing the by-law “was fraudulent and invalid, and all proceedings thereunder” (including of course the arbitration in which the plaintiff joined) are illegal and invalid; “. . . that the said lands were not expropriated by the said corporation for park, play-ground, or other municipal purposes, but, on the contrary, to enable the corporation to convey and transfer the same to the defendants in this action; and that the Municipal Corporation of the City of Toronto had no power to expropriate lands for such

purposes." Nothing, perhaps, was more strenuously attempted than to shew that the object of the by-law was to anticipate the action of the Harbour Commission; in other words, that, this land being required for harbour improvement, and for this only, the object was simply to secure dishonestly the intervention of the Official Arbitrator in advance, and so avoid a reference to three arbitrators by a later direct expropriation by the Harbour Commission. It is enough to say, as to this, that there is no evidence whatever to support this contention. Not only was this purpose not discussed or mentioned, but, so far as could be ascertained, this aspect of the case was never thought of by anybody. This was a prominent feature in the plaintiff's case.

I may as well here dispose of one or two other contentions urged by the plaintiff, as well,

It was argued that, before an expropriating by-law could be lawfully passed, there must be sufficient moneys to the credit of the parks appropriation fund or parks committee available for payment. I know of no condition or provision to that effect. The imposition of a separate rate for park purposes is only a method of civic administration or bookkeeping; the fund so collected is still the money of the city corporation; and the other revenues derived from general taxation are none the less available and liable for all legally incurred corporate obligations. The parks committee is only an adjunct of the city council, and not only has the city corporation been always ready and willing to make compensation to the plaintiff for his land when legally awarded, but as a matter of fact the plaintiff was actually paid \$50,000 on account of his holdings before he was entitled to payment of a dollar.

It is argued, too, that a municipal council must not "look ahead," must wait until acquisition, development, and user as a park, can be practically simultaneous acts; must not do for the people what alert and capable business men are doing every day for themselves and their families; must drift and wait until men who look ahead, including the speculator and the subdivider and the person irreverently denominated "the land-grabber" have captured everything in sight; and, although there is nothing in law, there is a great deal in common practice or ordinary municipal methods, to give colour to the argument. The land in question

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was obtained by patents from the Crown for sums aggregating about \$100; and, as early as the 24th January, 1907, when there was no Harbour Commission movement thought of, the city corporation had offered to purchase this land at \$10,852.50.

It was urged and dwelt upon, too, that in a contest between the city corporation and the plaintiff for a patent of one of these water-lots, in 1905, the Crown, exercising its discretion, decided in favour of the plaintiff; and so, impliedly, discountenanced public ownership or the user of this land for a park. Not at all, there was nothing left to implication. The Crown acted, and declared that it acted, on the well-established principle that, as a rule, the owner of the shore has a prior right over all other applicants for a patent for the adjoining water-lot; and so the incident only goes to establish these points, and none of them counting for the plaintiff, namely: that, if the council had looked ahead, they would have acquired the land on the shore, so manifestly essential to park development, long before 1905; would have had an irresistible claim to the patent, would have acquired it for \$42; and that, at all events, as early as 1905, the municipal council had formulated, more or less definitely, a comprehensive scheme for the construction of parks, boulevards, drives, etc., embracing and extending over a wide area, and including the land in question.

I do not find it difficult to decide this question, and it is only fair to the plaintiff that I should frankly declare the way I approach the decision of the issue of fraud. I am of opinion that, when a municipal council ostensibly acts within the powers conferred by the Municipal Act, purports to act in pursuance of a well thought-out and comprehensive scheme for the acquisition of parks, pleasure-grounds, boulevards, drives, gardens, and places for recreation and enjoyment, encircling the whole municipal area, and, in this way, accessible and beneficial to the inhabitants of every section of the municipality, when the propriety of the scheme has not been called in question and in so far as appears has been generally approved, has not been attacked by a single ratepayer as such, has been acted upon, and money has been expended in pursuance of it for many years, and when each plot of land, including the plaintiff's, is essential to the harmonious development of the whole—to say nothing of the attitude of the plaintiff during all these years, which I will refer to specifically

later on—fraud is not a presumption of law or to be hastily inferred; there must be more than conjecture or possibility—the fraud must be shewn by at least reasonably clear and satisfactory evidence. I find no evidence of fraud, or dishonesty, or double dealing, or trickery, in this case. This was not a sudden resolution to acquire the plaintiff's land in 1911 for harbour improvement, and as an incident of that commercial and utilitarian scheme; it was the culmination of a long-cherished plan—too long dreamt of and postponed—of which Mr. Ward, so far as the water-front is concerned, was an active and zealous pioneer, for the acquisition and construction of parks, open spaces, connected drives, gardens, etc., commensurate with the city's growth and needs, present and prospective.

The evidence before me is of two classes, documentary and verbal; to my mind, there is a vast difference in the weight to be attached to each. It would, I think, be more accurate to say that the evidence of what the council contemplated, planned, and did, is of record, as effective municipal action must be, and it is progressive, although not rapid, and all consistent, and consistent only, with the position taken by the defence; the verbal evidence for the plaintiff is an attempt to contradict this record by the testimony of some three or four councillors, each testifying as to some unexpressed thought or understanding in the back of his head, or, as he thinks, "a thought" that might be in the head of some one else—when the by-law, or the subsequent by-law to take possession, was passed, and as to which they have been silent ever since. Take it in the most unqualified sense, and it falls far short of shewing fraud or that any one ever dreamed of abandoning the park scheme or of diverting the western water-front to any purpose other than a driveway and park. The utilisation of this part of the city-front for commercial or dockage purposes has never been suggested.

Mr. Hocken, called by the plaintiff, although not clear as to the order of events, makes it quite plain that the plaintiff's and other lots along the western front were conveyed to the Commission to be "developed" for the city as park and driveway lands, according to the scheme advocated by Mr. Ward as early as 1905 or 1906, and to connect with the Home Smith scheme.

"Q. Do you remember Mr. Home Smith offering the city a driveway down the Humber river? A. Yes.

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"Q. Do you remember any proposition of Mr. Ward's in connection with running a sea-wall and parkway west along the lake front to the Humber river? A. Yes, Mr. Ward worked on that for many years.

"Q. Do you remember that properties had been expropriated from time to time going further and further west? A. Yes. . . . They began in 1905 or 1906.

"Q. Do you remember there was a scheme as far back as 1908 for having a boulevard, park, and driveway from Dufferin street to the Humber? A. Yes—Mr. Ward's scheme, which was afterwards enlarged by the Board's plan of the harbour. That was 200 feet. The harbour scheme goes out 600 feet."

And, Mr. Hocken's attention being called to exhibit 11, the agreement with the Harbour Commission, he said: "Perhaps the reason I would not charge my memory with that, it was always a part of the harbour scheme *to develop a parkway for the city and the city to provide the lands for that*. It provided some across the Island."

"Mr. McMaster: Q. Always part of the harbour scheme? A. Yes."

The Home Smith scheme was carried out.

In another place Mr. Hocken says: "The Harbour Commission was always regarded as something created by the city to administer the lands better than the council could do it."

This is not enough, even if it were all one way, but it is not. There is verbal evidence in support of the by-law, quite as dependable in itself as the evidence attacking the by-law; and, if a case can be conceived in which I should be justified in ignoring the intrinsic evidence of the municipal records, including the by-law, I would, on the verbal evidence alone, find that the by-law was passed in good faith, in pursuance of a long-contemplated parkway scheme, and for the purpose in the by-law briefly expressed. But this is not the way to determine this question. Not to go back beyond the period distinctly covered by the evidence, it is abundantly clear that, instead of a dishonest scheme to utilise the powers conferred upon this and other large centres of population, through the intervention of the Official Arbitrator, in lieu of the ordinary assessment tribunal, for the purpose of vesting this land in the Harbour Commission for dock and harbour pur-

poses, the by-law was passed in continuation of a long-established system for the gradual acquirement of land for park purposes, as the result of a steadily growing appreciation of the need of greater activity in creating parks, and the realisation of the obvious circumstance that the dredging and deepening of the harbour afforded an opportunity of reclaiming water-lots at a tithe of the expense to be incurred if the two enterprises, both in the interests of the city, were carried out as independent works.

Referring now to something that is not mere matter of opinion or conjecture, for the verbal evidence is characteristically of that class: in 1905 the city endeavoured to obtain one of these lots; and, as is shewn by the records of the application, the city council wanted it as part of the land to be set apart as a park at the mouth of the harbour, and extending along the water-front to Bathurst street and beyond. In 1905 or 1906 and for many years, Mr. Ward, laughed at and impeded by men of narrower vision, was yet able to obtain the assistance of a sufficient number of councillors, who looked ahead as he did, to obtain appropriations from time to time for his "sea-wall" and driveway, and other improvements along the city-front.

In 1906-7, Assessment Commissioner Forman, on instructions of the council, was steadily at work in a systematic effort to secure the land and water-lots between the Humber and Bathurst street as the basis of comprehensive park extensions, driveways, etc. In 1907 he had recently acquired 1,520 feet of frontage east of the plaintiff's land, and had been in negotiation with the plaintiff for the water-lots in question for a long time. That the city council, including the board of control and parks committee, were quite alive to the necessity of park extensions in January, 1907, is clear from the fact that they were regularly paying \$1,000 an acre for land for this purpose; and, on the 24th January, by letter from Mr. Forman to Mr. James Bicknell, K.C., acting for the plaintiff, the council definitely offered \$10,852.50 for the land in question. See correspondence, exhibit 25. The offer was refused on the 20th February, 1907; and, on the 28th May, the board of control decided upon expropriation. See again exhibit 25.

On the 18th February, 1909, the city council prepared a plan of the water-front improvements from Bathurst street to the Humber. It was not so broad or ambitious as the scheme now being carried out, but was on the same lines. See exhibit 4.

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There must have been a good deal of activity and investigation during 1909; for, on the 24th January, 1910, Mr. James Wilson, on the order of the parks committee, reported upon "a suitable system of boulevards and connecting park driveways for the City of Toronto," providing for a continuous driveway of more than 40 miles beginning at the Humber, encircling the city, crossing the Island, and returning to the mouth of the Humber—a plan or system of park development practically identical with the present park scheme now being carried into execution; the work on the water-front section being executed in connection with harbour development under improved conditions, and I should judge at greatly reduced cost. See exhibit 18 and map attached. For the order in which it is recommended that the acquisition of the land and the execution of the work should be proceeded with, see p. 12 of this report. That the board of control were still looking to the acquisition of the plaintiff's water-lots in the spring of 1911 is shewn by its order of the 17th and the report of Commissioner Wilson of the 18th May, 1911 (exhibit 27).

The city corporation has not abandoned its park scheme. On the 11th May, 1912, by-law 6269 was passed expropriating other land of the plaintiff north of the Grand Trunk Railway—a part of the same park scheme, but wholly distinct from the water-front; and for this compensation had been determined upon and paid. I find no more reason for attributing bad faith in the one case than in the other.

The Harbour Commission, the majority of its members being, as I have said, directly appointed by the city council, in addition to the carrying out of the development and improvement of the harbour along commercial lines, and the development of Ashbridge's Bay for industrial purposes, undertook, at the instance and on behalf of the city council, to combine the development of that part of the city's park scheme extending westerly by way of the Island, from Woodbine avenue to the mouth of the Humber—a distance of twelve miles. Mr. Cousins was appointed Chief Engineer of the Board in February, 1912, and on the 13th November reported to the board of control the recommendation of the Harbour Commission as to the combined scheme of harbour improvements and water-parks, boulevards, drives, ornamentation, etc.; and the proportion of expense to be borne by the city cor-

poration for that part of the work not essentially pertaining to harbour development. Founded upon this and the report and recommendations of the board of control to the city council, an agreement was entered into between the Harbour Commissioners and the city corporation (exhibit 11), by which the Harbour Commissioners undertake to fill in and reclaim, wall in and protect, 894 acres of land now covered with water, including the land of the plaintiff in and along the city-front, and to hand it over to the city council "for the use and enjoyment of the inhabitants of the City of Toronto as open spaces, parks, drives, boulevards, gardens, and other civic purposes," as in the agreement set forth, and in consideration of annual payments during forty years based on actual cost as therein set forth; and after forty years at a rental of \$1 a year. As late as the 29th October, 1914, Mr. Bicknell, then counsel for the plaintiff, in the arbitration based upon this by-law, evidently regarded the by-law as a *bonâ fide* expropriation "for park purposes," and obtained the \$50,000 already referred to as a payment on account of this and other lands upon that basis. See letter and receipt, exhibit 22.

Are the water-lots sufficiently described *or identified* in the by-law?

Nothing turns upon these matters in the decision I am about to give, but I mention as circumstances that may or may not become of consequence later on:—

(a) Section 576 of the Municipal Act of 1903, 3 Edw. VII. ch. 19, is not confined to land within the expropriating municipality.

(b) It is not provided in this Act that the lands to be expropriated are to be described in the by-law. The first statutory enactment in which I find it stated that the by-law shall contain "a description of the land" is sec. 322, sub-sec. (3), of the Municipal Act of 1913, 3 & 4 Geo. V. ch. 43. There is undoubted identification here; and, if the description is faulty, the expropriating corporation and its assigns, only, are prejudiced.

(c) If the land was not shewn to be within the city limits, by reason of errors in the Proclamation of 1903 and the remedial Act, can the words "in the City of Toronto" be rejected as surplusage, and the by-law read as expropriating land in an adjoining local municipality, thus conforming the description to that contained in the patents under which the plaintiff claims? The descrip-

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tion in the patents should be enough if the limits of the municipality are not legally shewn to have been altered in the meantime; and this the plaintiff contends. If I understand Mr. McMaster aright, he argued that the words, "the said point of intersection being where the south-westerly boundary of the said City of Toronto meets the said southerly limit of the Lake Shore road," might be rejected as an unnecessary addition, the specific point being already sufficiently defined; but, while I am disposed to agree with this, I have not gone into it carefully to see whether this would obviate the difficulty, as I think there is broader and clearer ground.

(d) As to the effect of the by-law, without more, sec. 576 of the Act of 1903 is significantly altered in wording and punctuation from earlier Acts, and differs, I think, from the present Act as well. The effect of the comma after "upon," which may be clear enough and the repetition of the conjunction "and," is what I refer to.

Taking up the issue then, without reference to (a), (b); (c), or (d), the contention of the plaintiff is, that the by-law does not expropriate this land, because by the Proclamation of 1903, by which, admittedly, this land and other lands were intended to be annexed, the south-westerly boundary of the city stops 1,000 feet south of the new road-bridge at the Humber, and so does not completely enclose the intended area. The language of the Proclamation, so far as relevant, is: "And we Ordain and Declare also that the south-westerly boundary of the said City of Toronto be extended and defined by a line drawn from the light-house on the Island to a point on the easterly boundary of the channels of the river Humber south of the new road-bridge, distant 1,000 feet measured southerly from the southerly face of eastern abutment of the said bridge, and that the area," etc. The objection is, that the line is not traced along and over this 1,000 feet.

After a great deal of evidence had been given, upon a reference before the Official Arbitrator, as to the value of the land in question and land of the plaintiff expropriated under another by-law (assessment under the two by-laws being taken together), counsel for the plaintiff successfully objected that, by reason of what I have referred to, the land in question was not sufficiently described or defined in the by-law. Assuming, without deciding, that the Proclamation was fatally defective, and that this by-law could not

be read as expropriating the land, whether in the city of Toronto, or in the township of York, in the county of York, as hereinbefore suggested, I am of opinion that the defect, if any there was, is remedied by the Ontario statute of 1916, 6 Geo. V. ch. 96, sec. 2, which is retroactive, and defines the south and south-westerly boundary of Toronto as: "commencing at the light-house on the Island; thence south-westerly to a point on the easterly boundary of the channel of the river Humber distant one thousand feet measured at (on?) a course south sixty degrees three minutes and twenty-two seconds east from the south-westerly angle of the easterly abutment of the new road-bridge; thence north sixty degrees three minutes and twenty-two seconds west one thousand feet to the south-easterly angle of the easterly abutment aforesaid."

I am asked to declare that the south-westerly boundary of the City of Toronto is not yet defined; and the reason and the only reason advanced is, that, instead of defining the first line as running north-westerly from the light-house, as it is in the Proclamation, it is said to run "south-westerly." I do not think I should give effect to this manifest blunder, and so prevent the decision of this action on the merits. If it created an uncertainty, it would be another matter—it creates none. The Legislature defines two points as to which there is no uncertainty. A line is to be drawn from the one to the other. In the absence of words to the contrary, a line means a straight line—the shortest possible course. Neither "westerly" nor "north-westerly" is needed to give direction to the line, and the erroneous introduction of unnecessary words cannot destroy a description otherwise clear. This has been recognised almost from time immemorial. The Courts have gone a good deal further than merely rejecting surplusage; but this is all that I need do here. They do not hesitate to read "north" for "south" or "west" for "east," or *vice versâ*, to give effect to what obviously was intended.

In *County of Welland v. Buffalo and Lake Huron R.W. Co.* (1870), 30 U.C.R. 147, affirmed in appeal (1871), 31 U.C.R. 539, the course was said to be "south," and should have been "north." The description was sufficient without either, and judgment was given at the trial affirming the sufficiency of the description, subject to the opinion of the Court; and Wilson, J., and Morrison,

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J. (Richards, C.J., not being present during the argument), held that the word "south" should be rejected. The case went to appeal; this point was not again raised.

The same kind of point came up squarely in *Ferguson v. Freeman* (1879), 27 Gr. 211; the first boundary being defined as running "northwards," it should have been "westward." On rehearing by the defendant of the decree pronounced by Vice-Chancellor Proudfoot, the full Court held that the description was sufficient, and the deed could be read either with the word "northwards" omitted, or by omitting it and substituting the word "westward."

It is to be noted that this boundary was sufficiently defined in the Proclamation; but, aside from this, I find that the land in question is, and by virtue of the retroactive provisions of the statute was at the date of expropriation, within the limits of the City of Toronto.

If I am right as to the interpretation of the statute, the answer to the third question becomes unimportant. I will, however, deal with it. Mr. McMaster submits that, in any event, the plaintiff was estopped from raising the question of boundary or the description in the by-law at the time the point was taken, that is, when Mr. Dewart became counsel in the arbitration after the death of Mr. Bicknell; and I am entirely of that opinion. I have been referred to many authorities on estoppel, but I do not think any useful purpose would be served by referring to them here. The conclusion to be come to is dependent upon a few facts, all of them undisputed, except one. The one disputed is as to whether Mr. Bicknell, on the opening of the reference, referred to the defect in the Proclamation and waived objections upon that point. Mr. Fairty swore to this. Mr. Bicknell's statement is not in the notes of evidence, and Mr. Fairty gave reasons for the omission. This question is not of capital importance, if as a matter of fact Mr. Bicknell knew of and appreciated the defect before or when the reference was taken up and refrained from making objection then or thereafter. It is not pretended that Mr. Bicknell ever objected to the by-law or reference upon this ground. It is shewn beyond question that Mr. Bicknell was aware of the terms of the Proclamation and alive to the possible effect of it before the by-law was passed.

In the course of negotiations by Mr. Forman to purchase this property on behalf of the city corporation, Mr. Bicknell, on the 20th February, 1907, wrote Mr. Forman: "Besides, you apparently have not considered the fact that part of the property you wish to buy is outside the city limits," etc. On the 29th May, 1907, Mr. Forman wrote inquiring as to whether Watson had further considered the city's offer to purchase, and asking an explanation as to what was meant as to part of the land being outside the city limits; and, on the 30th May, Mr. Bicknell replied that Watson did not desire to sell, and added: "The map which you have is wrong. The order in council which made the last addition to the Lake Shore road did not include that part of the property which theretofore was in the township of York" (exhibit 1, marked "without prejudice," but put in by the plaintiff). Whether there was an express waiver or not, with the by-laws and appointments, etc., in his hands, Mr. Bicknell attended the reference, joined in arranging for a joint hearing under the two by-laws, took no objection at all events, and proceeded with the reference and to give evidence of values from time to time from the 26th August, 1914, until the case for the claimant was completed, and hundreds of pages of evidence had then been taken. The attitude of Mr. Bicknell on the opening of the reference is of consequence. He put in the two by-laws, No. 5755—the one in question—and No. 6269, and said: "By-law 5755 expropriates the water-lot, and by-law 6269 expropriates," etc. He read the by-laws and added: "It is agreed that counsel will check up the measurements and agree upon the same later." He stated that a plan would be agreed upon, shewing different frontages, and that notice of expropriation would be put in and marked exhibit 3.

On the 2nd October, 1914, Mr. Bicknell wrote Mr. Johnston, city solicitor, in part as follows:—

"Re Watson Arbitration. The property at the Humber which belongs to Mr. T. H. Watson was expropriated under by-laws passed in 1911 (5755) and 1912 respectively. An arbitration has now been pending for some time, and the evidence of Mr. Watson has been completed; but, owing to other engagements of the Official Arbitrator, the city's case cannot be presented until November. It has been a great inconvenience to Mr. Watson to have his property tied up during such a long period of time. . . .

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The evidence shews the value of the expropriated property to be from \$50,000 up. I do not know what the evidence of the experts on behalf of the city may be, but in my view it cannot be below \$60,000. Under the circumstances, I would respectfully ask that the city make an advance of \$50,000 on account of the purchase-price, to Mr. Watson. . . . I would be glad if you would forward this application . . . with such recommendations," etc.

This payment on account was made, and a letter of acknowledgment and formal receipt returned, for payment of account on land expropriated at the Humber.

I am of opinion that, whatever may be the proper conclusion as to the preceding questions, the objection as to the city limits taken in this action comes too late.

It was stated, during the trial of this action, that the Official Arbitrator proposed to resume the reference without waiting to know the result of this action, and I then said I was not disposed to believe he would do so. Subsequently, Mr. Drayton was courteous enough to call upon me, and I found that the opinion I had expressed was correct.

It is argued by Mr. Bain, on the other hand, that the arbitrator cannot resume the reference. I am not directly concerned as to this, but I am not of that opinion; and, while I do not propose to give any directions or pronounce any judgment upon this question, I think he will proceed; and I know of no reason why he should not.

To summarise and put all matters arising in this action as clearly as I can: I find that by-law 5755 was passed in pursuance of a well-considered, definite plan for park extension and construction, upon the lines, generally, outlined in the report submitted by Mr. Wilson on the 10th January, 1910, in the *bonâ fide* exercise of powers conferred by sec. 576, and with the intention of administering and permanently using this and other land embraced in the park area for the purposes in that section defined; that the council did not abandon its purpose or lose its control by the conveyance in question, and is morally, and I think legally, bound to make good the title it purported to convey in pursuance of a combined scheme of park and harbour improvements; that the land in question and lands in the neighbourhood of the Humber generally are not required for or adapted to and cannot be utilised

for harbour development or improvement in a commercial sense; that, before and at the time of the execution of the deed, it was intended by the parties thereto that the city corporation should retain or resume effective control of the Watson and other lands at the mouth of the Humber and easterly to Woodbine avenue, as park lands, and that this is effectively secured by the agreement executed in pursuance of this purpose on the 26th November, 1914, and validated by an Act respecting the City of Toronto, 5 Geo. V. ch. 76 (O.), in which, amongst other things, it is declared that "the said parties are hereby authorised to . . . *carry out* the provisions thereof;" that, if the Proclamation of 1903 was defective, the defect was remedied retrospectively by 6 Geo. V. ch. 96, sec. 2, so as to read as if the omitted line on the west had been delimited therein; that the land in question was therefore properly located and described in the by-law, and legally expropriated; and, at all events, that, after all that has occurred and been done, to the knowledge and with the concurrence of the plaintiff, including possession and expenditure of money upon the property, the plaintiff cannot now be heard to object.

As to the costs of the action: the agents of the council, by a series of blunders, so astounding as to be almost inconceivable, have afforded some excuse for this litigation; and sufficient, I think, to make it right to modify the general rule as to the adjudication of costs. Substantially the Harbour Commission and the city corporation are the same body. I have considered whether I should annex a condition that there will be no appeal, but I think that should only be done in very exceptional cases. I am in favour of an unfettered right of appeal. This is an important case, and it is better, if I am wrong, that I should be set right.

There will be judgment dismissing the action without costs.

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RE CITY OF TORONTO AND TORONTO R.W. Co.

*Execution—Order of Dominion Board of Railway Commissioners Directing Payment by Railway Company to Municipal Corporation of Sum of Money Representing Part of Cost of Bridge—Dominion Railway Act, R.S.C. 1906, ch. 37, secs. 46, 56—Order Made Rule of Supreme Court of Ontario—Issue of Writ of *fi. fa.* thereon—Motion to Stay Execution—Jurisdiction of Supreme Court of Ontario—Jurisdiction of Board to Make Order—Right to Dispute—Effect of sec. 56—Sale of “Public Utility” under Execution—Power of Dominion to Adopt Machinery of Provincial Courts—Control of Provincial Courts over Orders of Board—Finality of Order of Board—Unconditional Direction for Payment—Form of Order.*

In July, 1909, an order was made by the Dominion Board of Railway Commissioners to the effect that the railway company should pay 15 per cent. of the cost of the construction of a certain bridge. This order, while final in its nature, contained no definite direction to pay; and an order was made by the Board, in November, 1917, directing the railway company to pay to the city corporation, which had paid the cost in the first instance, the sum of \$80,000. In September, 1909, an application was made by the railway company to the Board (under sec. 56 (3) of the Dominion Railway Act, R.S.C. 1906, ch. 37) for leave to appeal to the Supreme Court of Canada from the order of July, 1909; the Board refused leave; an application was then made (under sec. 56 (2)) to a Judge of the Supreme Court of Canada to permit an appeal; that application was also refused:—

Held, that the first order of the Board thus became, by virtue of sec. 56 (9), final and incapable of being reviewed; and the jurisdiction of the Board to make the two orders could not now be disputed.

British Columbia Electric R.W. Co. Limited v. Vancouver Victoria and Eastern R.W. Co., [1914] A.C. 1067, and *Toronto R.W. Co. v. City of Toronto* (1916), 53 S.C.R. 222, distinguished.

The order of November, 1917, was made a rule of the Supreme Court of Ontario, and the city corporation caused a writ of *fi. fa.* to be issued out of that Court for the purpose of levying the \$80,000:—

Held, that, while it might be that the sheriff could not take possession of and sell the railway under a *fi. fa.*, that did not prevent the issue of the writ; it concerned only its execution; there might be assets which could be taken and sold without interfering with the “public utility” operated by the railway company; and the issue of the writ might be a necessary preliminary to the taking of the appropriate proceedings for realisation.

Held, also, that sec. 46 of the Railway Act, providing procedure for making the order of the Board a rule of a provincial court, merely gives a simple and convenient mode of enforcing the orders of the Board—the Dominion adopting the machinery provided by the Province; the Dominion may provide for the enforcement of the decrees of its Courts or Boards; and there was no reason for regarding the course adopted as incompetent. But the provincial judiciary was not thereby given any control over orders of the Board.

Held, lastly, that, while in one sense the order made a rule of Court was not final—the payment directed being without prejudice to the contention of any party as to the correctness of the accounts presented by the city corporation—it did finally and unconditionally direct payment of \$80,000, and was sufficient in form to warrant the issue of execution for that amount.

Grand Trunk R.W. Co. v. City of Toronto (1904-5), 4 O.W.R. 450, 6 O.W.R. 27, and, in the Supreme Court of Canada, *City of Toronto v. Grand Trunk R.W. Co.* (1906), 37 S.C.R. 232, distinguished.

MOTION by the railway company for an order staying the writ of *fi. fa.* issued by the city corporation against the railway company,

upon an order of the Dominion Board of Railway Commissioners, made a rule of the Supreme Court of Ontario, pending the determination of the right of the corporation to receive payment of the money for the levying of which the writ was issued, and for an order directing the trial of an issue to determine such right.

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January 21. The motion was heard by MIDDLETON, J., in Chambers.

D. L. McCarthy, K.C., for the railway company.

C. M. Colquhoun, for the city corporation, objected that the Supreme Court of Ontario or a Judge thereof had no jurisdiction to entertain the motion.

February 4. MIDDLETON, J.:—The grounds assigned are:—

(1) The property of a public utility cannot be sold under an execution.

(2) The order of the Board under which the execution was issued is without jurisdiction.

(3) The order is not lawfully an order of this Court, the procedure of the Court being a matter for the Province, and not for the Dominion.

(4) The order is not final and conclusive in its nature.

The matter giving rise to this litigation is the construction of a bridge upon the line of Queen street over the river Don and over certain railway tracks upon the banks of the river. The construction of the bridge was ordered in 1906, and there was then argument as to the way in which the cost of construction was to be provided, and how it was ultimately to be borne. The city corporation paid the cost in the first instance, but the ultimate incidence of the cost remained an open question until the 23rd June, 1909, when a decision was given, afterwards embodied in the formal order of the 3rd July, 1909, to the effect that the Toronto Railway Company should pay 15 per cent., other railway companies being ordered to pay 70 per cent., and the city corporation the remaining 15 per cent.

While this order was final in its nature, it contained no definite direction to pay, and matters were allowed to remain in an unsettled shape until 1917, when an order was made, on the 30th November, for payment by each of the other contributing parties,

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to the city corporation, of a named sum which, in the opinion of the Board, would be well within the ultimate sum payable—the payment so directed being without prejudice to the contention of any party as to the correctness of the accounts presented by the city corporation.

The amount which the Toronto Railway Company is directed to pay is \$80,000. This order has now been made a rule of Court, and execution has been issued upon it.

An application was made to the Board on the 15th September, 1909, for leave to appeal to the Supreme Court of Canada from the order of the 3rd July, 1909; the Board refused leave, upon the ground that the contention of the company was not “a question of law,” within sec. 56 (3) of the Dominion Railway Act, R.S.C. 1906, ch. 37, which can be reviewed by the Supreme Court of Canada when leave is granted by the Board, but “a question of jurisdiction,” as to which an appeal will lie to the Supreme Court of Canada by leave of a Judge of that Court (sec. 56 (2)).

An application was made to a Judge of the Supreme Court of Canada to permit an appeal, and dismissed; and so the decision of the Board became, by virtue of sec. 56 (9),* final and incapable of being “questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari*, or any other process or proceeding in any court.”

The intention of the statute is to give finality to the decision of the Board, unless there is an effective appeal in the way pointed out by the statute. Unless there is an appeal upon a question of jurisdiction, the decision of the Board as to its own jurisdiction is thus given finality.

*The three sub-sections of sec. 56 here referred to read thus:—

2. An appeal shall lie from the Board to the Supreme Court of Canada upon a question of jurisdiction, but such appeal shall not lie unless the same is allowed by a Judge of the said Court upon application and upon notice to the parties and the Board, and hearing such of them as appear and desire to be heard; and the costs of such application shall be in the discretion of the Judge.

3. An appeal shall also lie from the Board to such Court upon any question which in the opinion of the Board is a question of law, upon leave therefor having been first obtained from the Board; and the granting of such leave shall be in the discretion of the Board.

9. Save as provided in this section,—

(a) every decision or order of the Board shall be final; and

(b) no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari*, or any other process or proceeding in any court.

The decision of the Privy Council, in 1914, in *British Columbia Electric R. W. Co. Limited v. Vancouver Victoria and Eastern R.W. Co.*, [1914] A.C. 1067, 19 D.L.R. 91, against the jurisdiction of the Board in the case then under consideration, and the decision of the Supreme Court of Canada in *Toronto R.W. Co. v. City of Toronto* (1916), 53 S.C.R. 222, 30 D.L.R. 86, in favour of the jurisdiction of the Board, were both obtained upon appeals launched in accordance with the Act.

The liability of the company being thus determined by the Board, and the statute giving finality to this decision, I should not attempt to delay its enforcement by directing the trial of an issue already concluded.

This disposes of the motion in its most important aspect—that covered by the second ground of attack.

The first ground is not well-taken. It may well be that the sheriff cannot take possession of and sell the railway under a *fi. fa.*, but that does not prevent the issue of the writ, and concerns only its execution. There may be assets which can be taken and sold without interfering with the “public utility” which is being operated by the company. Also a writ of *fi. fa.* may be a necessary preliminary to the taking of the appropriate proceedings for realisation.

Then the procedure provided by sec. 46* for the making of the order a rule of this Court is attacked.

This and the preliminary objection taken by Mr. Colquhoun may be considered together.

The Dominion Act, I think, makes the provincial Courts, so far as their executive and ministerial officers are concerned, ancillary to the Court or Board constituted by the Act for the purpose of determining the rights which come within the purview of the statute. These rights determined by the Dominion tribunal are to be enforced by the machinery of the provincial Courts. The decree of the Board, on being presented to the Registrar of the provincial Court, is to be entered of record, and thus becomes

*46. Any decision or order made by the Board under this Act may be made a rule, order or decree . . . of any superior court of any province of Canada, and shall be enforced in like manner as any rule, order or decree of such court.

2. To make such decision or order a rule, order or decree of any such court, the usual practice and procedure of the court in such matters may be followed; . . .

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automatically a judgment of the Court, to be enforced in the same way as an ordinary judgment pronounced in due course. This is a simple and convenient mode of enforcing the judgment of the Court, and many analogies may be found.

This in effect means no more than the adoption by the Dominion of the machinery provided by the Province. That the Dominion may provide for the enforcement of the decrees of its Courts or Boards is beyond question; and I can see no reason why the course here adopted should be regarded as incompetent.

But this does not give to the provincial judiciary any control over orders of the Board so directed to be enrolled and enforced.

When an Irish or Scotch judgment is enrolled in England for the purpose of execution there, this does not confer upon the English Court any jurisdiction to interfere with the judgment.

Finally, it is said that the order of the Board is not final, and so no execution can issue upon it. While in one sense the order is not final, yet it does finally and unconditionally direct payment of this \$80,000, and is quite sufficient in form to warrant the issue of execution for this amount.

In the case of *Grand Trunk R.W. Co. v. City of Toronto* (1904-5), 4 O.W.R. 450, 6 O.W.R. 27, *City of Toronto v. Grand Trunk R.W. Co.* (1906), 37 S.C.R. 232, there was no specific order to pay any sum, and an action was brought for an accounting to ascertain the sum payable.

For these reasons, the motion fails, and must be dismissed with costs. To enable the railway company to determine what course it will follow, I direct that this order shall not issue for a week.

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RE SCOTT AND SCOTT.

Will—Construction—Life-estate—Remainder—Power of Executor to Sell and Convey Land—Trust for Sale—Surviving Executor—Trustee Act, secs. 44, 49—Devolution of Estates Act, secs. 13, 14, 15, 19, 21, 23—Caution—Directions—Sale for Purpose of Distribution—Persons Entitled under Will—Brothers and Sisters “or their Heirs”—Period of Ascertainment—Brothers of Half Blood—Living Heirs or Issue of Deceased Brothers and Sisters—Per Stirpes Division.

W., by his will, made in 1861, appointed his wife and two other persons executors. He died in the same year; his wife died in September, 1917; one of the other executors survived her. W. willed and bequeathed to his wife during her natural life the whole of his real and personal property, including his farm, which was the sole property in question upon an application made in 1918, by the surviving executor, under the Trustee Act and the Vendors and Purchasers Act. The will then provided that, if it should be unsuitable for his wife to live on the farm, “she may if she deems it to be for her greater convenience with the advice and management of my executors dispose of the whole or part of the farm . . . to invest in other property provided always that whether this may be done or not the property belonging to her as coming from me shall at her death be disposed of in any way satisfactory to my executors so that all my brothers and sisters together with all my wife’s brothers and sisters or their heirs shall have personally an equal”—here a word seemed to be omitted—“in it share and share alike.” The farm, at the date of the death of the wife, remained unsold:—

Held, upon the motion above referred to, that the testator had effectively disposed of the fee simple remainder in the farm—there was no intestacy.

- (2) That the case was not governed by the Devolution of Estates Act, R.S.O. 1914, ch. 119, or dependent upon it; that the property did not vest immediately upon the death of W.; that the will created a trust for sale; and that the executors, under the Trustee Act, R.S.O. 1914, ch. 121, sec. 44, and the survivor of them, under sec. 49, had power to convey the farm, without the concurrence of the beneficiaries, he having agreed to sell and convey to one S.
- (3) That, for the greater security of the purchaser, a caution might be registered under the Devolution of Estates Act; and directions were given accordingly: see secs. 13, 14, 15, 19, 21, and 23 of that Act.
- (4) That the testator’s primary intention was to treat his brothers and sisters and his wife’s brothers and sisters as one aggregate, and to divide his property into as many shares as there were units in that aggregate. But he contemplated that all the beneficiaries might not be alive at the death of his wife, and the word “or,” in the expression “or their heirs,” should be read disjunctively; and so the right of each of the primary beneficiaries to take was not absolute, but contingent upon his being alive at the death of the testator’s wife, the period of distribution.
- (4) That “brothers and sisters” included those of the half blood.
- (5) That the persons entitled to share in the remainder were to be ascertained at the date of the death of the testator’s wife; the property was to be divided into as many shares as there were brothers and sisters of the testator and his wife then alive and brothers and sisters who had died leaving “heirs” (issue) then alive; the aggregate of the “heirs” of any deceased brother or sister to take only the share the brother or sister would have taken had he or she survived; and that share to be distributed according to the number of the “heirs” in each case and their relationship to the person for whom they were substituted, according to the Statute of Distributions.

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MOTION by Henry Scott, surviving executor of the will of Thomas Waugh, deceased, for an order declaring that the applicant was able to make a good title to lands of the deceased, which the applicant had agreed to sell to Andrew H. Scott; and also for an order determining questions as to the distribution of the estate of the deceased, arising upon the terms of the will.

The motion was made under the Trustee Act and the Vendors and Purchasers Act.

The motion was heard in the Weekly Court, London.

R. G. Fisher, for the applicant.

J. M. McEvoy, for Andrew H. Scott, the purchaser, and for the brothers and sisters of the wife of the deceased or their heirs.

February 4. LENNOX, J.:—When I heard this matter at London, I directed that Dr. W. E. Waugh be served with the notice of motion and other proceedings to represent the Waugh side of the family, and with notice that I would hear him at my Chambers, Osgoode Hall, Toronto, on the 1st December, 1917, at 11 a.m., if he desired to be heard. Dr. Waugh wrote me that he did not desire to say anything, and this branch of the family would be satisfied with such disposition of the case as I thought right to make.

I understand the parties who may be interested are very numerous, and are living in various places in Canada and the United States.

Section 2 (g) of the Trustee Act, R.S.O. 1914, ch. 121, interprets "trust," other than in certain mortgage cases, to "include implied and constructive trusts and cases where the trustee has some beneficial estate or interest in the subject of the trust" and to "extend to and include the duties incident to the office of personal representative of a deceased person; and 'trustee' shall have a corresponding meaning and shall include a trustee however appointed and several joint trustees."

Section 44 provides: "Where there is in a will a direction, express or implied, to sell, dispose of . . . any land, and no person is by the will or otherwise by the testator appointed to execute and carry the same into effect, the executor, if any, named in such will may execute and carry into effect every such direction

in respect of such land, and any estate or interest therein, in the same manner and with the same effect as if he had been appointed by the testator for that purpose."

It is provided by sec. 49 that: "Where there are several personal representatives, and one or more of them die, the powers conferred upon them by this Act shall vest in the survivor or survivors."

The deceased, by his will, appointed his wife, Janet Scott Waugh, executrix, and two executors, of whom the sole survivor is Henry Scott above named. Thomas Waugh made his will and died in 1861. Janet Scott Waugh died in September, 1917.

The relevant provisions of the will are:—

"I hereby will and bequeath to my beloved wife Janet Scott Waugh solely during the entire period of her natural life the whole of my real and personal property of whatever such property may consist that is to say the farm on which I now live and everything pertaining to it as well as all moneys debts or whatever else is mine at the day of my death. The said farm is known," etc. This is the land agreed to be sold.

"I will also that in the event of my death for various causes it may be unsuitable for my wife to live on the farm she may if she deems it to be for her greater convenience with the advice and management of my executors dispose of the whole or part of the farm before described to invest in other property provided always that whether this may be done or not the property belonging to her as coming from me shall at her death be disposed of in any way satisfactory to my executors so that all my brothers and sisters together with all my wife's brothers and sisters or their heirs shall have personally an equal in it share and share alike." There is no blank in the will where I have left a space after the word "equal," but it is clear enough that the word "share" or "part" or "portion" was inadvertently omitted, and at all events "share and share alike" makes the meaning quite definite.

The questions submitted to me relate solely to the land, and as to this no question was raised as to whether the testator had by his will disposed of the fee simple remainder in the land dependent upon the life-estate; and, although—the land having remained as it was at the death of the testator during the lifetime of Janet Scott Waugh—the expression "the property belonging to her as

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coming from me" is not an apt way of describing the remainder in fee, or such as to remove the question entirely from the area of doubt, yet the words, "whether this is done or not," and the concluding words of this sentence, evidently intended as a provision for the distribution of his whole estate at the death of his wife, and the whole scope of the will, I think, preclude the inference that the testator intended to die, or in fact died, intestate as to any part of his estate.

I am of opinion that this is a case not governed by the Devolution of Estates Act, R.S.O. 1914, ch. 119, or dependent upon it; and that the executors, under the Trustee Act, sec. 44, had, and the survivor of them, under sec. 49, has, power to convey without the concurrence of the beneficiaries.

Mr. McEvoy argued that the property vested immediately upon the death of the testator; but I think the provision of the will that the land could be sold and the proceeds invested in other property at any time in the lifetime of Mrs. Waugh is clearly inconsistent with that conclusion. It amounts to a reasonably definite trust for sale; and, although it is true that Mrs. Waugh was made the person to determine whether there should be a sale in her lifetime, she was precluded by the terms of the will from acting alone, and the power and trust, if exercised, were to be exercised by all the personal representatives or by all then surviving.

But it is desirable that the title of the purchaser should be as free from doubt as possible, and in the requisitions on title Mr. McEvoy points out that a caution under the Devolution of Estates Act has not been registered; and, although, as I have said, I think the surviving executor has power to convey independently of that Act, and that this is a case excluded by sec. 14, yet for the greater security of the purchaser, and to facilitate subsequent conveyances, it is right that a caution should be registered now. I infer that probate of the will has not been taken out, and whether it has or not is not of consequence: secs. 13 and 15. The proceeding will be under sec. 15; and, as it would be unreasonable to require the consent spoken of in clause (c), I direct the issue of an incidental or preliminary order for the registration of a caution, as provided for in clause (d), sec. 15. To secure the additional protection of this Act, and particularly of sec. 23, the purchase must

be carried out "in manner authorised by this Act." It is not shewn that there are debts, and there could hardly be at this date. I do not know whether there are infants or not.

This appears to be a sale "made for the purpose of distribution only"—sec. 21 (2)—and to wind up the estate. Assuming—though I am not of that opinion—that this is "property which . . . would not devolve on the personal representative," and that there are infants interested, I yet do not think it necessary that the Official Guardian should be asked to intervene: sec. 19. But, in order that my order should cover all the points involved, there should be an affidavit filed—made by one of the solicitors of the vendor, or the vendor, or some competent and reliable person—shewing that the property is being sold for a fair and reasonable sum. This being done, my order disposing of the motion will combine provisions dispensing with the concurrence of the interested adults, under sec. 21; and, if there be infants, dispensing with the consent of the Official Guardian, under sec. 19: and may express approval of the sale.

Subject to what has been stated, I find that the surviving executor has power to convey.

The case of *In re Koch and Wideman* (1894), 25 O.R. 262, is perhaps somewhat clearer than this case; hence the advisability, I think, of invoking the Devolution of Estates Act. In that case Mr. Justice Street said (p. 267):—

"Where such provisions have been made by the testator, the Act may supplement, but does not detract from them, and certainly does not destroy the express directions of a will as to the time and manner of conversion, for the purpose of vesting an absolute title in the beneficiary at an earlier period than the testator intended him to have it"—a view opposed to the argument of Mr. McEvoy that the property vested at the testator's death: see, also, Farwell on Powers, 2nd ed., p. 457.

This, I think, will settle all points as to the right and power to convey.

A good deal of confusion has arisen from the terms "classes," "original legatees," "substituted legatees," etc., the sense in which they have been used in earlier cases not always being clearly recognised. I am assuming that there were no brothers or sisters of the testator or his wife dead, leaving heirs, at the time the will

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was executed; and, as he died shortly after making the will, it is probable that there was no change in this regard in the meantime. If it is otherwise, I shall have to consider some further questions, and supplement what I have said, or rather what I am about to say—points involved in *Gray v. Garman* (1843), 2 Hare 268; *Smith v. Smith* (1837), 8 Sim. 353; *Ive v. King* (1852), 16 Beav. 46; and *Coulthurst v. Carter* (1852), 15 Beav. 421. These cases are, however, all based upon the finding of two or more original classes definitely provided for, and the exclusion of the idea of contingent, alternative, or substitutional beneficiaries. Assuming this basis of fact, I am of opinion that the testator's primary intention was to treat his brothers and sisters (of the whole blood and half blood) and his wife's brothers and sisters as one aggregate, and to divide his property into as many shares as there were units in this aggregate. But, as was pointed out in *Girdlestone v. Doe* (1828), 2 Sim. 225, he contemplated that all the beneficiaries might not be alive at the death of his wife, and in this case, as in that, "or" in the expression "or their heirs" is to be read disjunctively: and the consequence is, that the right of each of these primary beneficiaries to take is not absolute, but contingent upon his or her being alive at the death of the testator's wife, the period of distribution.

No question of lapse arises here, such as is frequently mentioned in English cases. There is a clearly expressed intention that the testator's wife shall take and enjoy all, in whatever form it may be, during her lifetime, and that after her death the specified persons "personally" or their heirs shall take it all in equal shares. There is, as said in *Jones v. Frewin* (1864), 3 N.R. 415, a gift to *individuals*, with a substitutionary gift in the case of the death of any of them leaving issue, in this case leaving "heirs," and in this case heirs surviving the testator's wife, for it is manifest that the testator intended "the aggregate" as "a class" to benefit, and that the share of any one dying before his (the testator's) wife without heirs (I do not mean collateral heirs) living at the time for distribution, should be enjoyed by the others. The date of the death of the testator's wife is the date at which the persons entitled are to be ascertained. The property is to be divided into as many shares as there are brothers and sisters of the testator and his wife then alive, and of any one of these who had died who left heirs surviving the testator's wife: the aggregate of "the heirs"

of any deceased "brother or sister" will take only the share the brother or sister would have taken had he or she survived; and this share will be again distributed according to their number and their relationship to the person for whom they are substituted, under the Statute of Distributions.

I think the word "personally" must be read as equivalent to "individually," and refers to the primary or original beneficiaries; that the words "or their heirs" of course apply to each original beneficiary, and may be read into the will as if they also appeared after "my brothers and sisters;" and that "all my brothers and sisters together with," etc., should be read "all my brothers and sisters, together with all my wife's brothers and sisters (or their heirs), personally an equal (share?) in it, share and share alike," punctuated as I have written it.

There is what purports to be a codicil added in these words:—

"Explanatory—By my brothers and sisters referred to in my will I mean to include all my father's children by both of his wives."

As there is only one witness, this is not perhaps an effective codicil, though it is undoubted evidence of the testator's intention as a matter of fact. I think that, without this, the same intention is to be gathered from the will itself. The testator was disposing of his property in a broad, liberal way: in including his wife's brothers and sisters, he was recognising claims not generally recognised; and that a testator so acting would not intend to exclude children of his own father is not an unreasonable inference, although, without evidence of surrounding circumstances, very far from conclusive. He says "*all* my brothers and sisters," but he uses the same language as to his wife's relatives, and in any case this would not mean very much.

The meaning of "brother" was much discussed in *Bridgman v. London Life Assurance Co.* (1879), 44 U.C.R. 536. Upon application for insurance, the questions were: "How many brothers have you had? A. Three, two living. State of health? A. Good; one died in infancy." The applicant had had four half-brothers, as well, of whom only one was living, and as to whom he said nothing. Burton, J.A., left the case to the jury on the question of good faith, the sense in which the applicant understood the questions, and materiality; and the jury answered favourably to the plaintiff. Upon appeal, Hagarty, C.J., after going into the question of

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the meaning of "brother," so far as could be ascertained from authorities, said: "One of my learned brothers thinks he would have taken the same view" (the view by the jury attributed to the applicant), "and given the same answer. My other brother and I think we would have mentioned our half-brothers, if we had any. I think the verdict for the plaintiff may stand."

This is not very emphatic; but, so far as it goes, it is a recognition that in such a case "brother" means a brother of the full blood, and generally the dictionary meaning of brothers or sisters is said to be children of the same father and mother.

In *Grieves v. Rawley* (1852), 10 Hare 63, Vice-Chancellor Turner, referring to this, said (p. 65):—

"It is true that the dictionaries so describe the relation of brother and sister," and adds: "I think that, in general, when a man speaks of his brothers and sisters, he speaks of them, not with reference to the definition of the word in the dictionary, but as a class, standing in the same relationship to one or both of his parents as he himself stands in. . . . And, however other parties may describe them, . . . I think that, in ordinary parlance, they would be called, and would call themselves, brothers and sisters." See a late case, *In re Cusin, Walker v. Cusin*, [1917] 1 I.R. 63.

Well, a good deal of latitude must be allowed in the construction of wills. The intention of the testator and the sense in which he used the terms employed are the paramount questions. Identically the same language may not be employed by different testators in the same sense. I think this will should be construed as including all brothers and sisters, all the children of the testator's father.

The costs of both parties should be paid out of the estate, of the executor on a solicitor and client basis.

[MIDDLETON, J.]

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Feb. 7.

RE INGRAM.

Will—Construction—Bequest of Residue to Younger Daughter—Small Residue when Will Made—Estate Largely Increased at Death of Testatrix—Will Speaking as if Made Immediately before Death—Wills Act, sec. 27—“Unless a Contrary Intention Appears by the Will”—Residue of “Moneys or Securities for Money”—Residuary Legatee Entitled to both—“Or”—“And.”

The testatrix died in January, 1917; her last will, which was proved, was made in 1906. Her husband predeceased her, dying in October, 1916; by his will, made in 1902, he left all his property to her. When the testatrix made her will in 1906, her property was of about the value of \$400; at the time of her death, by reason of her husband's death and bequest, the value of her property was more than \$10,000. She had three children; by her will she left small sums and certain chattels to her elder daughter and her son; to the younger daughter she left certain chattels and “all the rest residue and remainder of the moneys or securities for money I may die possessed of.”

By the Wills Act, R.S.O. 1914, ch. 120, sec. 27, “every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.”—

Held, that, although the effect of making the will speak as if made immediately before the death was greatly to increase the benefit conferred by the gift to the younger daughter, it could not be said that a contrary intention appeared by the will; and, therefore, the younger daughter took the bulk of the estate under the will.

Principles deducible from the cases bearing upon the application of the statute stated.

Everett v. Everett (1877), 7 Ch.D. 428, 433, 434, and *Vansickle v. Vansickle* (1884), 9 A.R. 352, 354, specially referred to.

Held, also, that the gift of the residue of “moneys or securities for money” was one; the younger daughter was not put to her election between “moneys” and “securities for money;” “or” might, if necessary, be read as “and;” the intention plainly was, that the residue of either “moneys” or “securities for money,” and of both, after paying the small legacies, should pass.

MOTION by the executors of the will of Catharine E. Ingram, deceased, for an order determining a question arising in the administration of her estate, involving the construction of the will.

January 22. The motion was held by MIDDLETON, J., in the Weekly Court, Toronto.

H. S. White, for the executors.

E. G. Graham, for Stella K. Ingram.

G. W. Mason and *A. G. Davis*, for the other adult children of the testatrix.

F. W. Harcourt, K.C., Official Guardian, for the infants.

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February 7. MIDDLETON, J.:—The late Catharine E. Ingram died on the 10th January, 1917, having made her will on the 18th January, 1906.

Her husband died on the 15th October, 1916, about three months before the testatrix, having made his will on the 4th June, 1902, leaving all his property to his wife.

At the time of the making of the wife's will, her property consisted of a small sum of money, a promissory note, and some chattels—amounting in all to about \$400; and this probably remained to the time of her death. From her husband's estate she received some \$10,000, including insurance.

At the time of the making of the husband's will, and until a year and a half before his death, he owned land, which he then sold (on the 10th March, 1915), and a mortgage to secure \$7,850, part of the purchase-money, was the main asset of both estates.

The wife's will is simple. She gives her son Clarence \$25; her daughter Rose, \$50, a shawl, and an oak bedroom suite "now in the spare room in the dwelling-house on my husband's farm;" her daughter Stella, "all the rest residue and remainder of the moneys or securities for money I may die possessed of," and certain enumerated chattels. Her husband and her daughter Rose are made executors of the will and guardians of the infant daughter Stella during minority.

Save as to one matter to be discussed, all this is plain enough. What is argued is, that it points to the distribution of the estate which the testatrix had at the date of the will, and does not operate upon the property which was acquired by the testatrix from her husband.

At one time this would probably have been so, for a will then did not operate upon after-acquired property, unless the intention that it should do so appeared by the will; but the Wills Act, R.S.O. 1914, ch. 120, sec. 27, provides that "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will."

I have read very many cases, with little satisfaction. I find general expressions—*e.g.*, *per* Draper, C.J.A., in *Plumb v. McGannon* (1871), 32 U.C.R. 8, 16, "The testator must in and by

his will manifest a contrary intention"—which do not carry the matter beyond the statute itself.

In *Everett v. Everett* (1877), 7 Ch. D. 428, 433, 434, Cotton, L.J., states a sound principle: "I think we ought not to fritter away the effect of the statute by catching at doubtful expressions for the purpose of taking the case out of the operation of the statute. . . . You must know the subject-matter of the gift and the circumstances with which the testator is dealing; but it is said that you must also take into consideration that the testator was a father who was making his will and distributing his property among his children. By this argument, in effect, we are asked not to rely upon the language of the testator . . . but to introduce a presumption of what his meaning was likely to be. We are asked not to look in the will for the expression of a contrary intention, but to conjecture what the intention of a father distributing his property among his children ought to be."

The true principle is happily stated by Spragge, C.J.O., in *Vansickle v. Vansickle* (1884), 9 A.R. 352, 354: "I take the proper course to be, to read the will assuming that the testator had read it immediately (using the word as meaning very shortly) before his death, and that, seeing nothing in it that he desired to change, and knowing that it would be read as the then expression of his will and intention, he had chosen to leave it as it was, although, if the rule of construction had been otherwise, and his will was to be read as expressing his intention at its date, he would, when reading it shortly before his death, have made alterations which—the rule being as it is—he judged not to be necessary. This of course can only be where a contrary intention does not appear by the will itself."

From all the cases two other general principles can be deduced. First, when the words used to describe either real or personal property given are general, they will pass all property which falls within the words used, looking at the will as though executed immediately before the death. Second, when the property given is specifically described, the specific description is not enlarged by the statutory rule of construction. The devisee may fail notwithstanding the statute, because there is no gift to him.

The more difficult case of something answering the devise being sold and other property which is capable of answering the descrip-

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tion being purchased after the date of the will, is treated in the text-books as open: Theobald, 6th ed., p. 130; Jarman, 6th ed., pp. 409 and 413; but the decision of Malins, V.-C., in *Castle v. Fox* (1871), L.R. 11 Eq. 542, 551, seems to accord with the view of our own Court of Appeal in *Vansickle v. Vansickle*, *supra*. In New Zealand the opposite view prevails: *Georgetti v. Georgetti* (1900), 18 N.Z.L.R. 849.

Each devise or bequest must be separately looked at. A testator may intend some specific thing, that he then has, to go to A., and may intend the statutory presumption to apply when he gives all his lands to B. The contrary intention may be shewn by the will as to one gift, or it may be shewn as to all, but the fact that it is shewn as to one raises no presumption that it is intended to be as to all.

Nor is it enough that the result of applying the statute is greatly to increase the benefit conferred by some particular gift. Here it was most strenuously argued that effect must not be given to the statute because, when the will was made, the daughter Stella would take \$200, but that, if effect is given to the statute, she takes \$10,000. Surely no such result is possible!

This is carrying the argument rejected in *Everett v. Everett* one stage further, and ignores the principle laid down by Spragge, C.J.O. How can I tell *from the will* that the woman who gave all her property, save two small sums, to her daughter in 1906, did not intend this same daughter to take all her larger fortune in 1916?

Then it is sought to give evidence to shew that in 1916 the testatrix did not in fact intend this daughter to take this large sum, and did not think this was the effect of her will. Plainly this evidence cannot be given. The will must speak for itself, and the contrary intention must be shewn on the face of the will.

Finally, it is argued that on the will the daughter is put to her election between the "moneys" and the "securities for money," as the word "or" is used. There would be an intestacy if these words are so used that the one or the other only passes.

I can find no instance where the word "or" has not been read "and" to avoid this result.

"Or" is a word most loosely used. It sometimes co-ordinates words which are regarded as synonymous or as practically equivalent.

ent. The testatrix probably meant money "or that which I regard as equivalent—securities for money."

But this ignores the fact that the gift here is one—a gift of the residue of "moneys or securities for money"—and I cannot doubt that the intention was that the residue of either and of both, after paying the small legacies, should pass.

Costs may come out of the estate.

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RE COTTER.

Feb. 8.

Will—Construction—"The Whole of my Money of which I Die Possessed"—Legacy Vested in Testator but not Paid until after his Death.

In 1882, K., by a trust disposition and settlement, directed her trustees to make payment, within twelve months after the death of her sister, to C., of a legacy of £800. K. died in 1885; C. in 1887; and K.'s sister in 1915. Some time after the last date, K.'s trustees paid the £800 to the administrators *de bonis non* with the will annexed of the estate of C. By the first paragraph of the will of C., he bequeathed to his wife "the whole of my money of which I die possessed to be used by her for the benefit of the family." He then bequeathed to his daughter certain books specifically described, and proceeded, "I bequeath to my eldest son . . . the remainder of my personal effects," and added particular injunctions as to the care of a ring, military decorations, and documents:—

Held, that the legacy from K. was money; it became vested in C. upon the death, in his lifetime of K., although the payment was postponed; and, under the words "the whole of my money of which I die possessed," it passed to the widow of C.—the words "of which I die possessed" not limiting the bequest to money actually in hand at his death.

APPLICATION on behalf of the Royal Trust Company, administrators *de bonis non* with the will annexed of the estate of James Lawrence Cotter, late of Sault Ste. Marie, in the district of Algoma, gentleman, who died on the 6th August, 1887, for the opinion of the Court in regard to the interpretation of the will of the deceased, in determining the following question: Does the money in the hands of the administrators, proceeds of a legacy of £800 left to the said Cotter by Mary Anne Kilgour, pass to Frances Cotter, the widow of the testator, under his will, or to his son George Sackville Cotter, or is there an intestacy as to such legacy?

January 17. The application was heard by LATCHFORD, J., in the Weekly Court, Toronto.

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W. D. Gwynne, for the Royal Trust Company, the applicants.
D. T. Symons, K.C., for Agnes Mary Cotter, representing the unmarried daughters of Frances Cotter, now deceased.

R. T. Harding, for George Sackville Cotter.

J. F. Boland, for James Lawrence Rogerson Cotter, representing the heirs and next of kin of James Lawrence Cotter and the persons entitled in remainder under the will of Frances Cotter.

February 8. LATCHFORD, J.:—The legacy was received by the administrators of the estate of James Lawrence Cotter at a date not stated, but, presumably, some time in 1915 or 1916.

An order was also asked (and made) declaring that Agnes Mary Cotter shall sufficiently represent the unmarried daughters of the said Frances Cotter, and that James Lawrence Rogerson Cotter shall sufficiently represent the heirs and next of kin of the testator and the persons entitled in remainder under the will of the said Frances Cotter.

By a certain trust disposition and settlement, dated the 28th March, 1882, Mary Ann Kilgour, late of Loanda Lodge, near Eskbank, Midlothian, Scotland, directed her trustees to make payment, within twelve months after the death of her sister, Sarah Stewart Kilgour, to the said James Lawrence Cotter, of a legacy of £800.

Mary Ann Kilgour died on the 25th August, 1885, and Sarah Stewart Kilgour died on the 27th February, 1915.

The first paragraph in the will of James Lawrence Cotter is as follows: "I bequeath to my wife Frances Cotter the whole of my money of which I die possessed to be used by her for the benefit of the family."

He then bequeathed to his daughter Agnes Mary certain books specifically described, and proceeded:—

"3. I bequeath to my eldest son George Sackville Cotter the remainder of my personal effects and enjoin him to take particular care of the ring given to one of our ancestors by James the Second of England, and on no account to part with it to any one. I lay the same injunction on him in regard to my father's military decorations and in regard to the documents touching my father's official life and also those concerning my own."

The legacy or gift from Mary Ann Kilgour did not become

payable in the lifetime of James Lawrence Cotter, or for long after his death in 1887. The period of "twelve months after the death of Sarah Stewart Kilgour" expired only on the 27th February, 1916.

In the meantime, on the 13th July, 1912, Frances Cotter, the widow of the testator, had died, having first made a will, by which, after making the usual provision for the payment of debts, etc., she bequeathed her property to her executors and trustees upon trusts not material to be considered, having regard to the order of representation made, and the conclusions I have reached as to the effect of the will in question.

I am of the opinion that, under the words "the whole of my money of which I die possessed" the legacy of £800 passed, and was intended to pass, to the widow of the testator. It did not pass and was not intended to pass to his son George Sackville Cotter under the words "the remainder of my personal effects." Accordingly there is no intestacy as to the legacy from Mary Ann Kilgour.

That legacy was money. It became vested in the testator upon the death, in his lifetime, of Mary Ann Kilgour, although by her direction the payment to him was postponed until twelve months after the death of her sister: *In re Bennett's Trust* (1857), 3 K. & J. 280; *Re Wood* (1880), 43 L.T.R. 730, 732. Had the words of the bequest been simply "the whole of my money," the legacy vested in Cotter would undoubtedly have been included. But it is argued that the added words restrict the scope of "the whole of my money," so as either to bring about an intestacy, or to pass the legacy on to George Sackville Cotter under the bequest of "the remainder" of the testator's "personal effects."

Looking at the will as a whole, it is, in my opinion, clear that the testator regarded his estate as consisting, first of money, and secondly of other, and different, personal property. After disposing of his money, he bequeathed certain specific personal effects to one child, and the remainder of his personal effects to another child. The enumeration of the effects bequeathed to the daughter, and of some of the effects bequeathed to the son, seems to me, when coupled with the prior bequest, completely to exclude any intention of granting to either of them the legacy of £800 at the time vested in the testator. Bearing this consideration in mind,

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I think the words "of which I die possessed" do not limit the bequest to his wife. There is nothing in the words or in the context to give "possessed" the narrow and restricted meaning in which it is sometimes used. In the will the phrase in which it occurs but adds emphasis to the idea of ownership expressed by the words "the whole of my money."

I refrain from citing cases. Those to which I have been referred, and many others which I have consulted, have not led me to modify the opinion I have formed apart from the cases; and that, according to Kay, L.J., in *In re Tredwell*, [1891] 2 Ch. 640, at p. 659, is the proper way to construe a will.

There will be judgment declaring that the £800 passed to Frances Cotter by the will of her husband, and that her devisees are entitled to the fund in the hands of his administrators. Costs out of the estate of James Lawrence Cotter.

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Feb. 15.

[MIDDLETON, J.]

LEWIS V. CHATHAM GAS CO.

Injunction—Consent Judgment—Motion to Suspend Operation—Jurisdiction.

The defendants, in 1918, sought an order to suspend for a few weeks the operation of an injunction contained in a consent judgment pronounced in January, 1916:—

Held, that the Court had no jurisdiction to make the order.

There is no law which enables the Court to sanction the breach of a contract or the violation of a judgment granting an injunction.

There is jurisdiction to alter a judgment once entered only when it does not express the real intention of the Court or when it has been obtained fraudulently. The judgment can be attacked only upon grounds upon which a contract can be attacked—and emphatically so when the judgment is a consent judgment.

MOTION by the defendants for an order suspending the operation of an injunction contained in a judgment pronounced on the 22nd January, 1916.

February 13. The motion was heard by MIDDLETON, J., as in Weekly Court, at a sittings for trials in Chatham.

J. G. Kerr, for the defendants.

R. L. Brackin, for the plaintiff.

February 15. MIDDLETON, J.:—The defendants operate an electric lighting plant supplying electricity to a number of persons in the city of Chatham.

This plant is operated by steam at the present time.

Some time prior to the granting of the injunction, an engine was installed, operated by internal explosion of a mixture of gas and air. This engine is very large and powerful; and it was found that, owing to the nature of the soil under the city, its operation produced such vibration that it was deemed a nuisance by all those residing within a considerable radius. Every endeavour was made to avoid this trouble, and the defendants have gone to much expense in seeking a remedy, but without result.

In this action an injunction was sought, and by a consent judgment was pronounced, restraining the operation of the defendants' works in such a way as to cause the vibration and jarring complained of.

There has been a fuel shortage in Western Ontario this winter; and the object of this motion is to permit the operation of the machine complained of notwithstanding this injunction, and notwithstanding the jarring and vibration, so that the steam now used for the operation of the steam-plant may be given to the Chatham Steam Heat Company, a company which heats residences and other buildings in Chatham by steam distributed from a central plant, which cannot produce sufficient steam to meet the present demand. This suspension is asked for six weeks only.

The *bona fides* of the application is attacked, and the motion is most strenuously resisted, and it is said that the nuisance resulting from the operation is most serious—far greater than any harm resulting from temporary use of oil-lamps or candles for lighting. The defendants are under no obligation to aid the heating company.

I do not find it necessary to enter into this controversy, as I find no jurisdiction in the Court to do what is now asked.

If the consent judgment is regarded as a judgment, it is final and binding, and it is in accordance with what was intended at the time. There is jurisdiction to alter a judgment once entered only when it does not express the real intention of the Court or when it has been obtained fraudulently. The judgment can be attacked only upon grounds upon which a contract can be attacked.

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This is emphatically so when the judgment is a consent judgment. The judgment then is based upon the contract of the parties. In *Attorney-General v. Tomline* (1877), 7 Ch. D. 388, Fry, J., said: "When a consent order has been drawn up, passed, and entered, it is not competent to this Court to vary that order, except for reasons which would enable the Court to set aside an agreement."

Mr. Kerr bases the application upon some supposed inherent jurisdiction of the Court over its own decrees. No doubt the Court has jurisdiction when granting an injunction to suspend its operation for a time to allow such things to be done as may mitigate the hardship of the injunction, and may from time to time extend the time for which the operation of the injunction is suspended. Also, the Court has the right to suspend the operation of an injunction to permit an appeal to be had; for, so long as an appeal is possible, the judgment is lacking an element of finality, and, using the term in an elastic sense, the matter is still *sub judice* and in the hands of the Court.

But I do not know of any law which enables the Court to sanction the breach of a contract or the violation of a judgment granting an injunction.

In times of emergency and public stress the Legislature has passed legislation which sanctions the sacrifice of private rights for the public weal, but this is the function of those who make and not of those who administer the law, and relief must be sought from the former.

I am far from suggesting that any such situation here exists as to justify any extraordinary measures. It would be impertinent for me to discuss the question.

The motion must be refused with costs.

[APPELLATE DIVISION.]

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Feb. 16.

EDWARDS V. BLACKMORE.

Company—Powers of—Promissory Note—Contract—Incorporation by Letters Patent Issued by Provincial Secretary under Ontario Companies Act, R.S.O. 1914, ch. 178—Specified Objects of Incorporation—Power to Contract for other Purposes—Sec. 210 of Act, Added by 6 Geo. V. ch. 35, sec. 6—General Capacity of Corporations Created by Charter—Interpretation of Added Section—Authority of President and Manager of Company to Enter into Contract and Make Promissory Note—Executed Contract under Seal—Sec. 23 (1) (a), (i), of Act.

The defendant company was incorporated by letters patent issued in 1914, signed by the Provincial Secretary and sealed with his official seal, under the authority of the Ontario Companies Act, R.S.O. 1914, ch. 178. The objects of incorporation set forth in the letters were, briefly, as follows: to acquire lands and buildings, improve and alter them, sell, lease, exchange, or mortgage them; to erect buildings and to deal in lands and building material, and generally to do all such things as were incidental or conducive to the attainment of these objects; to carry on business as brokers and agents, and to acquire, purchase, and take over a real estate, insurance agency, and building business carried on by B. & Co. This action was brought to recover the amount of a promissory note made by the defendants—the defendant company's signature being made thus: "Burks Limited, per A. W. Burk, Mgr." This note was a renewal of one given on account of the purchase-price of machinery and patent rights for the manufacture of machines for pressing clothes. The contract of purchase was executed by the signature of the president and manager and the affixing of the company's corporate seal.

The defences of the company were, that it did not make the note sued upon, and that it had no authority or power to do so under its charter; and it was held (MEREDITH, C.J.C.P., dissenting), that neither of these defences could prevail.

Judgment of MASTEN, J., affirmed.

Per LENNOX, J., and FERGUSON, J.A.:—By virtue of the provisions of sec. 6 of the Ontario Companies Amendment Act, 1916, 6 Geo. V. ch. 35, adding sec. 210 to the Ontario Companies Act, R.S.O. 1914, ch. 178, the company was endowed with all the capacity which a corporation created by charter had at common law—that is, almost unlimited capacity to contract; statements in the letters patent defining the objects of incorporation did not take away that capacity; and even express restrictions in the charter did not take it away, but should be treated as a declaration of the Crown's pleasure in reference to the purposes beyond which the capacity of the corporation was not to be exercised, a breach whereof gave the Crown a right to annul the charter.

Riche v. Ashbury Railway Carriage and Iron Co. (1874), L.R. 9 Ex. 224, and Bonanza Creek Gold Mining Co. v. The King, [1916] 1 A.C. 566, followed.

The contract being under seal and being executed by receipt of the articles purchased, the plaintiff not having acted in bad faith or with notice or knowledge that the contract was not within the objects of incorporation enumerated in the letters patent, and the president and manager having apparent authority to execute the contract and make the note sued on, he had, so far as the plaintiff was concerned, actual authority to do so.

Per ROSE, J.:—Having regard to the company's power, under the letters patent of incorporation, to acquire lands and buildings, and to the incidental powers conferred by the Companies Act, sec. 23, sub-sec. (1), clauses

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(a) and (i), including power to carry on any business, whether manufacturing or otherwise, calculated directly or indirectly to render profitable any of its property, and to purchase machinery and plant which it might think necessary or convenient for the purposes of its business, the contract of the company was not beyond the powers which it had, without the aid of the amendment of 1916.

The evidence was not sufficient to justify a holding that the contract by which the company acquired the rights and chattels sold by the plaintiff was not really the contract of the company at all.

Per MEREDITH, C.J.C.P.:—The transaction in question was one plainly without the purposes of the company's incorporation, and so one which it had no power to enter into; and the section (210) added to the Companies Act did not really aid the plaintiff's contention that the transaction came within the powers of the company. That section is part and parcel of the Act, is to have effect as such, and is to be interpreted so as to avoid rather than create contradiction or inconsistency. The company was not created by the Crown, but by statute. By sec. 210, it had "the general capacity which the common law ordinarily attaches to corporations created by charter," that is, in regard to the limited purposes of its incorporation, it had all the capacity of a person. The obvious purpose of the new section was to give provincial companies a foundation that would carry power to exist beyond the territorial limits of the Province, and it should be given no wider effect than the accomplishment of that object.

Review of the authorities.

The *Bonanza Creek* case, *supra*, and *Sutton's Hospital Case* (1613), 10 Co.

Rep. 1 a., explained and distinguished.

Ashbury Railway Carriage and Iron Co. v. Riche (1875), L.R. 7 H.L. 653, specially referred to.

Upon the facts in evidence, the note sued on was not the note of the company.

APPEAL by the defendants Burks Limited, an incorporated company, from the judgment of MASTEN, J., upon the trial of the action by him without a jury, in favour of the plaintiff against the appellants for the recovery of \$1,182.16 and costs.

The action was upon a promissory note for \$1,122.60, dated the 22nd May, 1916, a renewal in part of an earlier note for \$1,500, both notes being made by the three defendants, Blackmore, Burks Limited, and Menet, in favour of the plaintiff, payable one month after date. The note sued upon was signed by Blackmore and Menet; the signature purporting to be that of the defendant company was: "Burks Limited, per A. W. Burk, Mgr."

The defendants Blackmore and Menet did not appear, and judgment was entered against them by default.

The only defence originally raised by the defendants Burks Limited was, that they had no authority or power to make the note; and their appeal was based on that defence.

The letters patent incorporating Burks Limited were as follows:—

Province of Ontario.

By the Honourable

William John Hanna,

Provincial Secretary.

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To all to whom these Presents shall come

Greeting:—

Whereas the Ontario Companies Act provides that, with the exceptions therein mentioned, the Lieutenant-Governor may by letters patent create and constitute bodies corporate and politic for any of the purposes to which the authority of the Legislature of Ontario extends.

And whereas by the said Act it is further provided that the Provincial Secretary may, under the seal of his office have, use, exercise, and enjoy any power, right, or authority conferred by the said Act on the Lieutenant-Governor.

And whereas by their petition in that behalf the persons herein mentioned have prayed for letters patent constituting them a body corporate and politic for the due carrying out of the undertaking hereinafter set forth.

And whereas it has been made to appear that the said persons have complied with the conditions precedent to the grant of the desired letters patent, and that the said undertaking is within the scope of the said Act.

Now therefore know ye that I, William John Hanna, Provincial Secretary, under the authority of the hereinbefore in part recited Act, do by these letters patent hereby constitute the persons hereinafter named, that is to say, Arthur Wellington Burk, barrister-at-law, Arthur Reginald Burk, steamship passenger agent, William Percy Dent, representative, and Albert Burnese and Lewis Henry Phleegee, office clerks, all of the city of Toronto, in the county of York, and Province of Ontario, and any others who have become subscribers to the memorandum of agreement of the company, and persons who thereafter become shareholders in the company, a corporation for the following purposes and objects, that is to say:—

(a) To purchase, lease, take in exchange or otherwise acquire lands or interests therein, together with any buildings or struc-

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tures that are now or may hereafter be erected thereon, and to otherwise improve, alter, and manage the said lands and buildings and to sell, lease, exchange, mortgage, or otherwise dispose of the whole or any part of the lands, buildings, or structures thereon; (b) To erect buildings of all kinds and to deal in lands and building material and to take and hold mortgages or agreements for any unpaid balance of the purchase-moneys on any of the lands, buildings or structures, sold, and to sell, mortgage, or pledge, or otherwise dispose of said mortgages or agreements, and generally to do all such things as are incidental or conducive to the attainment of the above objects or any of them; and (c) To carry on business as brokers and agents and to acquire, purchase, and take over a real estate, insurance agency, and building business now carried on by Burk & Co. at the said city of Toronto; Provided, however, that, except as to taking and holding mortgages as aforesaid, nothing in these letters patent contained shall be deemed to empower the company to make loans, whether for building purposes or not, upon lands not the property of the company, or upon lands which, though once the property of the company, have by any deed, conveyance, transfer, or alienation become the property of another; and further provided, that it shall not be lawful for the company hereby incorporated: (1) To issue, constitute, or make any withdrawable or terminating stock, fund or shares, under any name or contrivance whatsoever; or to issue, constitute, or make any stock or shares whatsoever other than the capital stock and shares which are hereinafter mentioned, and which shall be fixed, permanent, and non-withdrawable capital stock or shares; (2) To take from or levy upon any stockholder, shareholder, member, contract-holder, or person, any deposit (bearing interest or not bearing interest) or any subscription, periodical dues, assessments, or contributions, or to take subscriptions or payments or make calls upon any stock or shares (howsoever designated) other than lawful subscriptions, payments, and calls upon the said fixed, permanent, and non-withdrawable capital stock or shares; (3) To use or raise, maintain or have, a fund for making a loan or advance to a purchaser (including intending purchaser) of property, whether such loan or advance in the form of money or money's worth is paid directly to the purchaser or is paid by the company to the vendor, to be

repaid in any form or manner by the purchaser to the company; (4) To enter into or undertake any contract whereby the benefit is or is made dependent in any manner or degree upon the collection of sums levied upon or to be received from persons holding similar contracts, or upon or from members of the company; and (5) To transact or undertake any business within the meaning of the Ontario Insurance Act, 1912, or of the Loan and Trust Corporations Act; the corporate name of the company to be Burks Limited; the capital of the company to be forty thousand dollars, divided into four hundred shares of one hundred dollars each; the head office of the company to be situate at the said city of Toronto; and the provisional directors of the company to be Arthur Wellington Burk, Arthur Reginald Burk, and William Percy Dent, hereinbefore mentioned.

Given under my hand and seal of office at the city of Toronto, in the said Province of Ontario, this fourth day of March in the year of our Lord one thousand nine hundred and fourteen.

W. J. HANNA,

Provincial Secretary.

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November 5, 1917. The appeal was heard by MEREDITH, C.J.C.P., LENNOX, J., FERGUSON, J.A., and ROSE, J.

J. M. Ferguson, for the appellants. The sole question here is that of *ultra vires*. The appellants say that the note sued on was given on account of a purchase of certain articles which they had no right, under their charter, to make. The judgment appealed from is based on *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566, 26 D.L.R. 273. That case is distinguishable from the present on its facts; and, in any event, what was decided there was merely that a provincial company can do business outside the Province of its incorporation. See *Union Bank of Canada v. McKillop and Sons Limited* (1915), 51 S.C.R. 518, 24 D.L.R. 518. The recent enactment, sec. 6 of the Ontario Companies Amendment Act, 1916, 6 Geo. V. ch. 35, adding sec. 210 to the Ontario Companies Act, R.S.O. 1914, ch. 178, does not give to every company the unlimited power of a natural person to contract and to do business. When the whole Act is read, and its purpose considered, it appears that the effect of the legislation is, that a corporation created by charter is given the ordinary powers

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of a natural person only in regard to the objects named in its charter: *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653. Even if the contract was *intra vires* the company, it was *ultra vires* its officers.

R. S. Robertson, for the plaintiff, respondent. The doctrine of *ultra vires* does not apply to a chartered company at common law, and this is the kind of company referred to in the legislation of 1916. The *Bonanza Creek* case is applicable, and the limits of the powers of a provincial corporation, where unrestricted by legislation, are there placed at those of a natural person. See also *Diebel v. Stratford Improvement Co.* (1916), 37 O.L.R. 492, at pp. 497, 498; *S. C.* in appeal (1917), 38 O.L.R. 407, 33 D.L.R. 296; *British South Africa Co. v. De Beers Consolidated Mines Limited*, [1910] 2 Ch. 502. The defendants Burks Limited were incorporated by charter; and so, under the cases and the legislation, have the general capacity of a company created by charter at common law. Therefore, even if their acts are not within the objects specified in the charter, they are not *ultra vires*. As to the contract being *ultra vires* the officers of the company, the contract was made under the seal of the corporation.

Ferguson, in reply.

February 16, 1918. FERGUSON, J.A.:—This is an appeal by the defendants Burks Limited from a judgment of Masten, J., pronounced at the trial on the 1st day of June, 1917, whereby he directed judgment to be entered for the amount of the plaintiff's claim and costs.

The action is on a promissory note for \$1,122.60, dated the 22nd May, 1916, made by the defendants Norwood Blackmore, Burks Limited, and R. C. Menet, in favour of the plaintiff, payable one month after date at the Dominion Bank, Toronto. The defendants other than Burks Limited did not appear in the action, and judgment was entered against them by default.

The writ of summons being specially endorsed, Burks Limited filed an affidavit by Arthur Burk, raising the defence set out in the two following paragraphs taken from his affidavit:—

“(2) That the said defendants Burks Limited have a good defence to the action on its merits.

"(3) If the said defendants Burks Limited did make the said note sued on herein, they had no authority or power to do so under their charter."

Burks Limited is a company incorporated by letters patent under the Ontario Companies Act, dated the 4th March, 1914. The objects of incorporation are to carry on a real estate business. The defence relied on is, *ultra vires*, in that the note sued on was given on account of a purchase of machinery and patent rights for the manufacture of machines for pressing clothes.

At the trial an amendment was allowed setting up misrepresentation in connection with the contract of purchase, which contract (exhibit 3) is signed by the three defendants, the company executing in the name of its president and manager and by its corporate seal.

The judgment appealed against was pronounced at the conclusion of the evidence. The learned trial Judge found the facts against the defendant company's allegation of misrepresentation, and disposed of the question of *ultra vires* by the following statement:—

"As far as *ultra vires* is concerned, I do not think any argument would alter the view I hold. I have had occasion to study this case" (*Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566), "and I have a very decided view with regard to it. Of course I am quite open to hear argument, but no argument is likely to alter the view I hold."

On the hearing of the appeal, it was stated to us that the learned Judge intended, by the foregoing statement, to express the opinion that, by reason of the decision in the *Bonanza Creek* case, the doctrine of *ultra vires* no longer applies to companies incorporated in the Province of Ontario, by letters patent; and the argument on the appeal was confined to the question of *ultra vires*.

Since the argument, I have carefully perused and considered the *Bonanza Creek* case, also an article by Victor E. Mitchell, K.C., author of "Canadian Commercial Corporations," in which he discusses the doctrine of *ultra vires* in the light of this and other recent Privy Council decisions; and I am, in view of the decision in the *Bonanza Creek* case and of the amendment to the Ontario Companies Act made in 1916, by sec. 6 of 6 Geo. V. ch. 35, of the opinion that the contract of purchase was not *ultra vires* of the

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defendant corporation. As I read the *Bonanza Creek* case, it is there decided that a company incorporated by letters patent, under the Great Seal of the Province of Ontario, derives its being, vitality, and capacity not only from or under the Ontario Companies Act, but from and by reason of the exercise, by the Lieutenant-Governor of the Province, of the prerogative right of the Crown to grant a charter of incorporation; and that, by virtue of the exercise of such prerogative, the company so incorporated is thereby created with all the capacity of a common law corporation, save only in so far as the conferring of such capacity on companies by the exercise of that prerogative right by the Lieutenant-Governor of a Province is limited by the provisions of the British North America Act, or by other express statutory provision assented to by the Crown. The subject is dealt with at p. 584 of the report of the *Bonanza Creek* case, as follows:—

“The words ‘legislation in relation to the incorporation of companies with provincial objects’” (British North America Act, sec. 92) “do not preclude the Province from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the Province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the Province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*. It is, in their Lordships’ opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted. It follows, as the Ontario Legislature has not thought fit to restrict the exercise by the Lieutenant-Governor of the prerogative power to incorporate by letters patent with the result of conferring a capacity analogous to that of a natural person, that the appellant company could accept powers and rights conferred on it by outside authorities.”

It is elsewhere in the judgment further pointed out that, even when a company is incorporated by statute or under an Act of

Parliament, it is possible for the Legislature so to create the company that it shall have all the general capacity of a common law corporation. See the judgment at p. 578, where the proposition is stated as follows:—

“Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law would attach if, but only if, the statute has by its language gone on to attach them. . . . The language may be such as to shew an intention to confer on the corporation the general capacity which the common law originally attaches to corporations created by charter. In such a case a construction like that adopted by Blackburn, J., will be the true one.”

The construction adopted by Blackburn, J., and referred to in the foregoing quotation, is that expressed by him in *Riche v. Ashbury Railway Carriage and Iron Co.* (1874), L.R. 9 Ex. 224, 264, as follows:—

“I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be, Does the statute creating the corporation by express provision, or by necessary implication, shew an intention in the Legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, as incident to it, a general capacity to contract, the question is, Does the statute creating the corporation by express provision, or necessary implication, shew an intention in the Legislature to prohibit, and so avoid the making of, a contract of this particular kind?”

The question raised by Blackburn, J., as to the intention of the Legislature to confer a general capacity to contract, is in this case answered by the Act of 1916, ch. 35, sec. 6, whereby the Legislature of the Province of Ontario has expressly enacted and declared that:—

“Every corporation or company heretofore or hereafter

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created . . . (e) by or under any general or special Act of this Legislature, shall, unless otherwise expressly declared in the Act or instrument creating it, have, and be deemed from its creation to have had, the general capacity which the common law ordinarily attaches to corporations created by charter.”

Therefore, while the charter of the defendant company does not appear to have been issued under the Great Seal of the Province of Ontario, but to have been issued under the seal of the Provincial Secretary, yet by virtue of the foregoing express statutory provision, it is endowed with all the capacity which a corporation created by charter had at common law, and the questions arise: How can its capacity be limited? Can its capacity be limited by something contained in the charter, or must it be limited by statute? And in this case have there been any limitations put upon the capacity? These questions are partly dealt with in the judgment of Blackburn, J., above quoted; and at p. 264, as follows:—

“When we are construing a statute creating and regulating a corporation, it is right to bear in mind that, as Lord Coke says, ‘It is a maxim in the common law that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law.’ . . . ‘That to make the words giving an express liberty or right have the effect of controlling or limiting that which would otherwise exist, they must be very plain.’”

They are also dealt with in the following statement from pp. 583 and 584 of the report of the *Bonanza Creek* judgment:—

“In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is therefore not *ultra vires*, although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter. In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not

possess the general capacity of a natural person and the doctrine of *ultra vires* applies.”

The same question is dealt with in Palmer's Company Law, 10th ed., p. 3, as follows:—

“There still, however, subsists a difference of a fundamental character between a chartered company and a company formed under a special Act or registered under the Companies Acts, and it is this: at common law a corporation created by the King's charter has power, as was determined in the *Sutton's Hospital Case* (10 Rep. 13), to deal with its property, to bind itself by contracts, and to do all such acts as *an ordinary person* can do, and so complete is this corporate autonomy that it is unaffected even by a direction contained in the creating charter in limitation of the corporate powers. For the common law has always held that such a direction of the Crown—though it may give the Crown a right to annul the charter if the direction is disregarded—cannot derogate from that plenary capacity with which the common law endows the company, even though the limitation is an essential part of the so-called bargain between the Crown and the corporation. See judgment of Bowen, L.J., in *Baroness Wenlock v. River Dee Co.* (1883-1887), 36 Ch.D. 674, 685, and of Blackburn, J., in *Riche v. Ashbury Railway Carriage and Iron Co.*, L.R. 9 Ex. 224. This feature—the unrestricted corporate capacity of the chartered company—is in marked contrast to the strict delimitation by the Legislature and the Courts of the statutory or registered company to its defined objects.”

These questions are also dealt with by Cotton, L.J., at p. 685 (note) of the judgment in the *Wenlock* case (*supra*), where, after quoting from the *Sutton's Hospital Case* (1613), 10 Co. Rep. 1 *a.*, referred to in the *Bonanza Creek* case, and by Mr. Palmer, he says:—

“At common law a corporation created by the King's charter has, *primâ facie*, and has been known to have ever since *Sutton's Hospital Case* (10 Rep. 13), the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to; and even if by the charter creating the corporation the King imposes some direction which would

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have the effect of limiting the natural capacity of the body of which he is speaking, the common law has always held that the direction of the King might be enforced through the Attorney-General; but although it might contain an essential part of the so-called bargain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King had created. When you come to corporations created by statute, the question seems to me entirely different, and I do not think it is quite satisfactory to say that you must take the statute as if it had created a corporation at common law, and then see whether it took away any of the incidents of a corporation at common law, because that begs the question, and it not only begs the question, but it states what is an untruth, namely, that the statute does create a corporation at common law. It does nothing of the sort. It creates a statutory corporation, which may or may not be meant to possess all or more or less of the qualities with which a corporation at common law is endowed. Therefore, to say that you must assume that it has got everything which it would have at common law unless the statute take it away is, I think, to travel on a wrong line of thought. What you have to do is to find out what this statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found the definition of this new creature. It is no use to consider the question of whether you are going to classify it under the head of common law corporations. Looking at this statutory creature one has to find out what are its powers, what is its vitality, what it can do. It is made up of persons who can act within certain limits, but in order to ascertain what are the limits, we must look to the statute. The corporation cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature, and if you look at the case in that way you will see that the legal consequences are exactly the same as if you treat it as having certain powers given to it by statute, and being prohibited from using certain other powers which it otherwise might have had."

These authorities, I consider, establish that a corporation created by charter had at common law almost unlimited capacity

to contract, and that statements in the charter defining the objects of incorporation do not take away that unlimited capacity, and that even express restrictions in the charter do not take it away, but are simply treated as a declaration of the Crown's pleasure in reference to the purposes beyond which the capacity of the corporation is not to be exercised, a breach of which declaration gives to the Crown a right to annul the charter.

Some of the foregoing authorities are reviewed and considered in *British South Africa Co. v. De Beers Consolidated Mines Limited*, [1910] 1 Ch. 354, in connection with the powers of a company incorporated by Royal charter, and the opinion is there expressed that the doctrine of *ultra vires* does not apply to such a chartered company, but that such company has all the powers of a private person, and acts done in breach of this charter, though a ground for revocation by *scire facias*, are nevertheless valid. The ground of this opinion was, that a chartered company has all the general capacity of a common law corporation.

In *Diebel v. Stratford Improvement Co.*, 37 O.L.R. at pp. 497, 498, Boyd, C., expressed an opinion that the amending Act 6 Geo. V. ch. 35 appears to confer complete corporate autonomy on the statutory incorporated companies and to put them on the footing of Crown-chartered companies with unrestricted corporate capacity.

The defendants Burks Limited being a company incorporated by charter, it follows from the declaration contained in the amending Act of 1916, and from these decisions, that it is a company endowed with the general capacity a corporation created by charter had at common law; and that, even if its acts and contracts are not within the objects specified in the charter, yet they are not *ultra vires*—that is, made without capacity. I have not overlooked the circumstance that the charter in the *Bonanza Creek* case appears to have been issued under the Great Seal, while the charter in this case does not appear to have been so issued; and, were it not for the amending Act of 1916, I should be obliged to consider carefully whether or not the opinion expressed by the Judicial Committee of the Privy Council in the *Bonanza Creek* case, at p. 583, that there is no difference between a charter issued under the hand and seal of the Governor-General, and a charter issued under the hand and seal of the Secretary of State

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for the Dominion, that both were an exercise of the prerogative rights of the Crown, is true in respect of charters issued under the hand and seal of the Provincial Secretary, instead of under the Great Seal of the Province, and by the hand of the Lieutenant-Governor; but I consider that the amending Act plainly extends to companies incorporated by the Province of Ontario, whether incorporated by special Act or by charter under the Ontario Companies Act; and it is not necessary to consider the foregoing question. I am also of opinion that the meaning of the expression used in the amending Act, "general capacity which the common law ordinarily attaches to corporations created by charter," and the principle that such capacity may not be limited by the charter, seem to be well established; the Province of Ontario has by express legislation attached to this company all the capacity of such a corporation; and by so doing has, in my opinion, effectually annulled all limitation that would otherwise by the words of the charter be put upon the capacity of this corporation to carry on business. For these reasons, I am of the opinion that the defence of *ultra vires* of the company fails.

At the trial and on the argument of the appeal it was mentioned, though not fully argued, that, even if the contract of purchase was *intra vires* of the company, yet it was *ultra vires* of the directors and president and general manager of the company.

It may well be that, while the defendant company might, under the circumstances I have outlined, have capacity to enter into a contract to purchase machinery for the manufacture of clothes-pressing machinery, yet the directors, as managers of the corporation, or Mr. Burk, as manager under the directors, would have no implied authority to bind the company to a contract not within the scope of the objects or purposes of the company as expressed by the words of the charter.

It will be seen, from a perusal of the quotations I have made above, that the enumeration in the charter of the objects for which the company is incorporated cannot be considered as a declaration that the company shall not do things other than those particularly set out, but that it requires at least express words of restriction in the charter, or the statute, to confine operations of the company, or even to confer upon a person aggrieved the right to apply, by *scire facias* proceedings, to cancel the charter. In this charter

there are no words of prohibition, and I do not find any words in the statute expressly so limiting the operations of the company. In the *Riche* case the question is discussed by Blackburn, J., but he was there of the opinion that the statute under which the company was incorporated had attempted expressly to limit the operations of the company to the objects as affirmatively declared in the memorandum of association; and that, for that reason, while the company had still common law capacity to contract, yet, if it contracted outside of the express words of limitation, it required the unanimous consent of every shareholder in order to make such a contract valid, and that any dissenting shareholder could restrain the making or carrying out of such a contract.

Here the contract which is called in question is made under the seal of the corporation, is executed by delivery of the machinery, and was made by and with the president and general manager of the company, and it is not made out or found that the plaintiff acted in bad faith or had notice or knowledge that the contract was even beyond the objects of the company as expressed in the charter, and it was not beyond their capacity as expressed by the amending Act; and I am of the opinion that, because the contract is under seal, and is also a completed contract (the defendants received the goods and machinery purchased and resold), and because the president and general manager had apparent authority to execute the contract, and make the note sued on, he had, so far as this plaintiff is concerned, actual authority to do so. See *National Malleable Castings Co. v. Smith's Falls Malleable Castings Co.* (1907), 14 O.L.R. 22, 30; *Biggerstaff v. Rowatt's Wharf Limited*, [1896] 2 Ch. 93; *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629.

For these reasons, I would dismiss the appeal with costs.

LENNOX, J.:—The Ontario Act of 1916, ch. 35, sec. 6, declares that:—

“Every corporation or company heretofore or hereafter created . . . (e) by or under any general or special Act of this Legislature, shall, unless otherwise expressly declared in the Act or instrument creating it, have, and be deemed from its creation to have had, the general capacity which the common law ordinarily attaches to corporations created by charter.”

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There is no conflict in this case as to the distribution of legislative power between the Dominion and the Provinces under the British North America Act. In the *Bonanza Creek* case, [1916] 1 A.C. 566, in the judgment of the Privy Council at p. 584, it was said:—

“The words ‘legislation in relation to the incorporation of companies with provincial objects’ ” (British North America Act, sec. 92, provision 11) “do not preclude the Province from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the Province from legislating so as to create, by or by virtue of a statute, a corporation with this general capacity.”

The defendant corporation was incorporated before sec. 6 above quoted was passed. The Legislature has declared that it shall apply to “every corporation heretofore” as well as “hereafter,” “created . . . by or under any general or special Act of this Legislature.” The defendant company was incorporated by letters patent issued under a general Act of the Legislature, that is, the Companies Act: and “the general capacity” of the company is not curtailed by anything to the contrary “expressly declared in the Act or instrument creating it.” It is not contended that the Act is not *intra vires* of the Legislature; and, if it were, the judgment just quoted from determines the question. That “the general capacity which the common law ordinarily attaches to corporations created by charter” includes the powers purported to be exercised in this case, cannot be open to question at this day; and, if questioned, the ground, if I may say so with respect, is well covered by authorities discussed in the judgment of my brother Ferguson.

Whether the officers of the company who entered into the contract acted within the scope of their actual or ostensible authority from the company—as distinguished from the capacity of the company itself—was a question of fact for the learned trial Judge; and his finding upon this—necessarily involved if not declared in the judgment he pronounced—is not to be lightly disturbed, nor unless it is manifestly wrong.

The Legislature has spoken very definitely as to the capacity to contract of all corporations created by or under its Acts, general

or special; and, although this may go far beyond legal opinion previously entertained as to the capacity of trading corporations incorporated for specific and defined purposes, and may be debatable as a matter of policy or expediency, it is my duty to endeavour to effectuate the intention of the Legislature.

I would dismiss the appeal.

ROSE, J.:—The action is upon a promissory note for \$1,122.60, a renewal for part of an earlier one for \$1,500, bearing the names of the defendants as makers, given for the price of certain chattels and “rights” sold by the plaintiff. The “rights” seem to have been the right to call a certain clothes-pressing machine by a particular name; the chattels were the equipment for manufacturing the machine. Judgment went by default against the defendants other than Burks Limited; so that the only matters to be considered are the defences raised by that company.

At the trial, the company directed the greater part of its evidence to the defence of misrepresentation inducing the contract, and did not develop very fully the facts upon which the other defences depend; so that, the defence of misrepresentation failing at the trial, and counsel for the company abandoning, before us, all attack upon that part of Mr. Justice Masten’s judgment, we are left with rather meagre evidence upon which to deal with the other defences. Those defences are that the company did not make the note in question, and, under its charter, had no power to make it.

The company received, by its letters patent of incorporation, power to purchase or otherwise acquire lands, together with any buildings or structures thereon, and to improve, alter, and manage such lands and buildings and to sell, lease, exchange, or otherwise dispose of them; to erect buildings of all kinds and to deal in lands and building material; to carry on business as brokers and agents, and to acquire, purchase, and take over a certain real estate, insurance agency, and building business, theretofore carried on by Burk & Co. From its incorporation in 1914 until the time of the transactions in question, January, 1916, its business was “chiefly” transacted by Mr. A. W. Burk, as manager. The negotiations with the plaintiff (or with the plaintiff’s son, who

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acted for him) for the sale to the three defendants were, so far as the company was concerned, carried on by Mr. Burk; the contract of purchase is signed by him as president and manager of the company, and is sealed with the company's seal; the notes are signed in the same way. The plaintiff's son had not previously met Mr. Burk, and did not know anything about Burks Limited. The chattels sold were delivered at premises in Sheppard street, Toronto, of which Mr. Burk and the defendant Menet seemed to have control; and the business of manufacturing and selling the machine was there commenced.

By the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 23, sub-sec. (1), clauses (a) and (i), the company had, as incidental to the powers set out in the letters patent, power to carry on any business, whether manufacturing or otherwise, calculated directly or indirectly to render profitable any of its property; and to purchase machinery and plant which it might think necessary or convenient for the purposes of its business. We do not know whether or not it owned the premises in Sheppard street; if it did, and if those premises were at the time vacant, it might well have been very wise to acquire some plant, at a small price, and to carry on a manufacturing business there: to do so might "render profitable" premises which it would otherwise have been unprofitable to carry; and it is easy to suggest other reasons why the company might well have thought it "necessary or convenient for the purposes of its business" to place this small amount of plant in a building which it was authorised to improve, alter, and manage, and to sell, lease, exchange, or otherwise dispose of.

As I have said, there is no evidence that the company did or did not own the building; and it is not suggested that the plaintiff was told that it did not own it; so that, even if the plaintiff is to be assumed to have known the contents of the letters patent of incorporation, there is no evidence that he had knowledge of any facts, if there were any, which ought to have led him to suppose that the company was not, in fact, exercising, as incidental to the main purpose of its business, that power which it appeared to be exercising through its president and manager. Mr. Burk is a solicitor of this Court, and knows the difference between acting upon behalf of a company and fraudulently using the name of a company in a personal transaction. He revised the agreement

and wrote the note, and tells us that he intended the note to be genuine and valid; but he also says: "My company had nothing to do with it. The company never got anything from it. There was another company formed, the Menet & Langton Limited;" and, upon that bald statement, we are asked to hold, in the face of the documents, that Mr. Justice Masten was in error in treating the transaction as the company's transaction: to hold, in fact, that, throughout, Mr. Burk was, in fraud of the plaintiff, simply using the name of the company in a transaction of his own; and that, although the plaintiff, in perfect good faith, relying upon what appeared to be the company's promise to pay, sold his goods to the company and delivered them to the president and manager of the company, who appeared to be acting upon the company's behalf, there really was no sale, and no promise to pay. For my part, I decline to accept the evidence as sufficient to justify such a holding. Therefore, I think the appeal fails and that it is not necessary to discuss the effect of the decision in the *Bonanza Creek* case, or of the amendment of the Ontario Companies Act by the statute 6 Geo. V. ch. 35, sec. 6. See *National Malleable Castings Co. v. Smith's Falls Malleable Castings Co.*, 14 O.L.R. 22, at p. 28.

MEREDITH, C.J.C.P. (dissenting):—Although the amount involved in the action is not great, one of the questions involved in this appeal—if taken seriously as it must be now—is a question of much importance, and the answer to it must be one of wide-spread consequence in business affairs—if heed be given to it in the conduct of business affairs; and is one which must be answered as we are unable to agree upon a minor question, also involved in this appeal, which, otherwise, might dispose of it.

It was upon the major question that the case was dealt with, mainly, at the trial: and upon it, almost entirely, the appeal was argued here.

The judgment appealed against, standing upon this ground, causes results which, in this Province, cannot but be startling.

For instance, a company incorporated in this Province for the purpose of aiding in the propagation of the Gospel may spend all its energies and means in aiding in the propagation of infidelity, or in the manufacture or sale of cards and dice and other appliances which are commonly employed in gambling: a company incor-

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porated for mining purposes may spend its life and fortune in the laundry business; and—this case, if the facts be as the plaintiff alleges—a company incorporated to carry on a “real estate and insurance” business, may also indulge in the speculative buying of “clothes-pressing” devices.

That which has been decided in this case, with, admittedly, startling effect, is this: that a company, incorporated in this Province, to carry on a certain clearly defined business, and though, in form, in declaration, and in fact, incorporated under the statute-law of the Province, is really quite unaffected by the statutes, being incorporated also by the Crown in the exercise of one of its prerogatives, or else having the general capacity of a company so incorporated, with the result that it has “a general capacity analogous to that of a natural person” and is unrestricted in every respect.

Never, until very recent days, had any such notion been advanced, if indeed imagined, in this Province. Provincial legislation has always contained full provision for the incorporation of companies, for business purposes, in the Ontario Companies Act, now comprising 210 sections; and all such companies have always been deemed entitled to the benefit of its provisions, favourable to it, as well as subject to the onerous requirements of it. And it should be needless to say to any one of this Province: that the Ontario Companies Act contemplates and provides for incorporation for limited definite purposes only, which purposes must be set out in the application for incorporation, and which have always been and still are set out in the “charter,” and to which the incorporation is expressly confined by it, as appears in the letters patent in question in this action—and that these purposes can be limited or extended only by supplementary letters patent obtained under the provisions of the Act: see sec. 16 (1) (c) and sec. 16 and following sections: but, as there may be others concerned, it may be worth while adding these words, which to most men may seem superfluous.

Somewhat early in the life of the Courts of this Province, it was held, in a somewhat half-hearted manner, that a corporation had not power “to make binding contracts” in any other country than that which had created it: see *Union India-Rubber Co. v. Hibbard* (1856), 6 U.C.C.P. 77; *Genesee Mutual Insurance Co. v.*

Westman (1852), 8 U.C.R. 487; *Bank of Montreal v. Bethune* (1836), 4 U.C.R. (O.S.) 341; and *Washington County Mutual Insurance Co. v. Henderson* (1856), 6 U.C.C.P. 146.

But a ruling so impracticable, in those as well as in these days, and in this Province, could not but be disregarded in numberless business transactions; and, after some years, the question came up for consideration again in the Courts of this Province, when the opposite conclusion was reached, and the earlier rulings were overruled: *Howe Machine Co. v. Walker* (1874), 35 U.C.R. 37: since which time, until quite recently, I doubt if any one ever thought of a reversion to anything like the narrow notions given effect, to some extent, in those earlier cases. And I doubt, too, whether any ruling of Judge, Court, or Council could effect, substantially, that which is a practical necessity here, trade by provincial companies, to some extent, beyond the territorial limits of the Province of their incorporation.

And I should perhaps add, parenthetically, that, though Mr. Lindley, in his book on the Law of Companies, discredited the Courts of this Province with the earlier erroneous rulings, to which I have referred, he failed to give them credit for the correction of them in the later case: see Lindley's Law of Companies, 5th ed., p. 910.

All that being so, and more also yet to be mentioned, one may very well wonder why, and whence, all this recent intermeddling with the law relating to provincial companies, and the deplorable muddle in which, especially if the judgment in appeal stand, it has left them; and the more wonder that it should be, if the truth be, as it seems to be, that it has all arisen from a contest between the Federal and Provincial Governments respecting the revenue derived from the incorporation of companies, and carried on, substantially, to enforce the rights of the one against the other in that respect. That, if they could agree upon that incidental and comparatively trivial matter, all directly concerned could be relieved from the confusion, worry, and wrong which present conditions impose upon them. If the British North America Act, 1867, be not amended so as to make sense of its provisions respecting the incorporation of companies, very simple concurrent federal and provincial legislation should give the needed relief, for instance in permitting a provincial company to become also a Dominion

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company, and *vice versa*, by some very simple proceeding. Exact what fees you may, and divide them as you please, but give all needed capacity and power, but no more, to all companies, may well be said to the disturbers of the peace.

This governmental litigious contest seems so far to have ended thus: provincial Governments can, under legislation, or under a Crown prerogative, create companies which may acquire extra-territorial capacities: the case of the *Bonanza Creek Gold Mining Company*, [1916] 1 A.C. 566, 26 D.L.R. 273; and *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588, at p. 597, 26 D.L.R. 288: that Parliament has power to require a foreign company to take out a license before carrying on business even in a single Province: *Attorney-General for Canada v. Attorney-General for Alberta*, *supra*: and that a Provincial Legislature, by way of an Ontario enactment, may require a Dominion company to be licensed under it before carrying on business in the Province of Ontario: *Currie v. Harris Lithographing Co. Limited* and *Attorney-General for Ontario v. Harris Lithographing Co. Limited* (1917), 41 O.L.R. 475: and that provincial legislation in the Province of British Columbia, requiring that Dominion companies shall be licensed or registered, as provided in that legislation, as a condition of carrying on business in that Province, is *ultra vires*: *John Deere Plow Co. Limited v. Wharton*, [1915] A.C. 330, 18 D.L.R. 353: that is ended thus so far: and it is to be hoped may end altogether in a settlement out of Court of all such questions in a manner having more regard for the companies and their shareholders, and the public at large, than whither the revenue derived from the incorporation of companies shall go. The importance of bearing in mind all these things shall, I hope, become obvious when the effect of the recent provincial legislation, so much relied on by the respondent, is considered.

Coming now directly to the major question involved in this appeal: Mr. Robertson has stated the case for the respondent very fairly and comprehensively thus: "However much I might dislike it if I were a shareholder of the company, it is now the law that, though incorporated for the purpose of carrying on one kind of business only, a company may engage in any other: it has in this respect the same rights and powers as if it were a human being: that that was settled by the Judicial Committee of the

Privy Council in the recent case of the *Bonanza Creek Gold Mining Company*; and that, if there could be any question as to that, all ground for questioning it has been removed by recent provincial legislation: the Ontario Companies Amendment Act, 1916, 6 Geo. V. ch. 35, sec. 6."

But, as to the case relied upon, it seems to me to be no authority for Mr. Robertson's contention. All that was decided in that case was: that a provincial company is capable of vitality beyond the territorial limits of the Province which created it. Much was said in that case which would be helpful to the respondent here, but for essential differences in the facts of the two cases. Much was said in that case which was not necessary for its determination, but was doubtless considered needful in considering the many questions involved in the case of *Attorney-General for Ontario v. Attorney-General for Canada*, which was argued with it, and is reported almost immediately after it: [1916] 1 A.C. 598, 26 D.L.R. 293. The real question involved in all that litigation seems to have been answered in little over two lines (pp. 584, 585) of the report of the case of the *Bonanza Creek Gold Mining Company*: that the provisions of the British North America Act, 1867, do not "appear"—that is, appear to the Judicial Committee—"to preclude the Province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity"—that is, "permitting operations outside the Province"—reversing the judgment of the Supreme Court of Canada, that a Province had no such power: it is difficult to understand how otherwise it could be that provincial companies could have such capacity. The governmental powers being divided between the Dominion and the Provinces, it could hardly be that either can go beyond that which is assigned to it; how can the Provincial Legislature or the Provincial Government indirectly acquire a power encroaching upon that which is assigned to the Dominion and exceeding that assigned to the Province? But the decision, as it is, leaves, I hope, the matter as it has always been supposed to be: a provincial company, in a foreign country, is, like any other alien entity, entitled to such rights as the foreign country may permit it to have, within the limits of its home-created power.

And, in that case, the letters patent were issued "by the Lieutenant-Governor of the Province of Ontario under the author-

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ity of the Ontario Companies Act—R.S.O. 1897, ch. 191—and of any other power or authority vested in him.” The letters patent in this case are those of the Provincial Secretary, who had power to issue them, under the Ontario Companies Act only, but only “for any of the purposes to which the authority of this Legislature extends.” So that, if extra-territorial vitality depended on a charter from the Crown by virtue of its prerogative, this company could have had, at that time, no such vitality. This fact, like another which I have mentioned, becomes one of importance on the subject of the effect of the recent provincial legislation yet to be discussed.

And, in this case, there is also this great difference from the other: in the other case, the purpose of the incorporation was “to carry on the business of mining and exploration in all their branches,” without any restriction as to place; and that was all the company did: the single contention was that there was power to do it only in the Province of the incorporation. In this case the purpose and the only purpose of the incorporation was, and was expressed to be, to deal in land and as insurance brokers only; and that which is objected to, in this action, was a transaction—if really the appellants had anything to do with it—altogether foreign to any such purpose. If in the other case the extra-territorial business had been that of, for instance, innkeeping, or farming, need it be said that very different considerations would have been applied to it?

Neither that case, nor any other, prevents the appellants setting up successfully the defence of *ultra vires*, which they have set up, and upon which they have throughout relied.

Then does the recent enactment stand in their way, in that respect? The judgment in the case of the *Bonanza Creek Gold Mining Company* was pronounced on the 24th February, 1916, in London, England, when the Provincial Legislature was in session at Toronto, in Canada; and the enactment in question was passed during that session, and assented to, at its close, on the 27th April, 1916: and so its purpose seems to me to be manifest; a rush for revenue which had been jeopardised by the judgment of the Supreme Court of Canada; and which, from the judgment of the Judicial Committee of the Privy Council, might have seemed, to those who were anxious about it, in need of some legislative propping. No need existed of any legislation for any other pur-

pose than to give provincial companies a foundation that would carry power to exist beyond the territorial limits of the Province; doubt might well have existed on first, or indeed second, reading of the judgment of the Judicial Committee: whether companies incorporated by charter of the Provincial Secretary, or of the Lieutenant-Governor of the Province granted under the Ontario Companies Act, would have that foundation: so, in haste, "the general capacity which the common law ordinarily attaches to corporations created by charter," in so far as the Legislature had power to confer it, was conferred upon provincial companies in the manner set out in the enactment—all such companies, whether "heretofore or hereafter created." It ought to be obvious what the mischief intended to be remedied was; and what, the object of enactment: and I can find no reason, or justification, for giving it any wider effect than the accomplishment of that object.

What is contended for, by the respondent, is: that it gives to every company power as unlimited as a person has. In other words, that it repeals the Ontario Companies Act, and leaves the company just as if it had been incorporated under the Crown prerogative at common law; which, I should have thought, is manifestly erroneous. The enactment in question is the 210th section of that Act; it is part and parcel of it, and is to have effect as such, and to be interpreted so as to avoid rather than create contradiction or inconsistency: and is but one of several amendments—to the principal Act—made in this amending Act, which is intituled "The Ontario Companies Amendment Act, 1916."

It would be quite too unreasonable to contend, for instances, that no company is now subject to the prospectus clauses of the Act; to its provisions limiting liability and requiring the use of the word "limited" in the company's name—keeping books and an hundred and one other things; or that it is not entitled to any of the benefits or advantages the Act confers. The companies remain just as much as ever under its provisions, and are just as much as ever companies created by statute; the additional general capacity conferred upon them, if any, is in respect of their extra-territorial vitality. They are not companies created by the Crown. And so, if a company so created had unlimited power, this company could not have it: *Baroness Wenlock v. River Dee Co.* (1885), 10 App. Cas. 354; and *Ashbury Railway Carriage and Iron Co. v.*

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Riche, L.R. 7 H.L. 653. In the former case even Lord Blackburn, who, following Parke, B., was a strong advocate of the wide power notion, felt obliged to say that he thought the law laid down in the latter case applies to all companies created by any statute for a particular purpose: and in the case of *Attorney-General v. Great Eastern R.W. Co.* (1880), 5 App. Cas. 473, the same learned Judge said (p. 481) of the same case, that it appeared to him "to decide at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited:" though I should prefer to put it that where any body is incorporated for any particular purpose its powers are limited to such purposes, but, in such purposes, it has the legal capacity of a person; if it be created with one arm, in law, one-armed it must remain until some creating power adds another or others.

There is no escape from this: either the company is statute-restricted, that is, subject to the provisions of the Ontario Companies Act, and consequently within the rule made unquestionable by the House of Lords in the *Riche* case; or else it is wholly statute-uncontrolled, and has the capacity of a company created by the Crown under the Crown's prerogative in that respect; whatever that capacity may be. The respondent must take the latter contention or obviously fail.

And it does seem to me to be inconceivable that the Legislature meant to, and did, in an instant of time, without the consent, and without the knowledge, of company, shareholder, creditor, or any other person interested, convert numberless companies incorporated for limited particular purposes, and always before confined to such purpose, into unlimited companies with all the legal powers of a human being: an expansion and growth which would put Jack's Beanstalk quite to shame. It is incredible to me: and none the less so because it cuts off the revenue from "supplementary letters patent."

But, if there were no such limitation by reason of being statute-created, if the appellants had been created by the Crown under a charter in the words of the statutory charter which they have—the word "charter," as last used, I take from the Ontario Companies Act, sec. 3—I am quite unable to agree with Mr. Robertson that

it would have the effect contended for by him. No case that was cited, nor any that I have ever seen, so decides. In regard to the limited purpose, if any, of its incorporation, the company has ordinarily all the capacity of a person. What need of more than that? What sense in limiting the purpose of the incorporation in words if it is to be unlimited in law? When so limited in the charter, how can it be other than that the company is so restricted; and indeed impliedly prohibited from exceeding the power thus conferred upon it? The words of the charter in question are: "Now therefore know ye that I, William John Hanna, Provincial Secretary, under the authority of the hereinbefore in part recited Act, do by these letters patent constitute the persons hereinafter named, that is to say . . . and any others who have become subscribers to the memorandum of agreement of the company, and persons who thereafter become shareholders in the company, a corporation for the following purposes and objects, that is to say" And upon this document, and upon it alone, this company was brought into being, and exists.

The *Sutton's Hospital Case* (1613), 10 Co. Rep. 1a., as it is commonly called, is always relied upon as the authority for such contentions as are made by the respondent in this case: but that case is no authority for such contentions: the question involved in this case did not arise, and it could not have arisen, in that case. Nor did any question at all analogous to it arise out of that case, which was one calling in question the validity of the famous Sutton Foundation. A corporation had been created by Royal charter for the purpose of giving effect to Thomas Sutton's great charity: and the question was, whether the property devoted by him to that purpose had validly passed to the corporation, which was called "the Hospital of King James founded in the Charterhouse within the County of Middlesex." The case "was argued at the bar for the plaintiff by John Walter of the Inner Temple, Yelverton of Gray's Inn, and lastly by Bacon, Solicitor-general; and for the defendant by Coventry of the Inner Temple, Hutton, Serjeant at Law, and by Hobart, Attorney-general:" and ten objections were made to the right of the corporation to retain the property for the purposes of the charity; not one of which touches in the remotest way the question involved here: and those ten objections are thus characterised by the learned author of the

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“report” of the case: “Which brief report I have made of these objections, because I think them, or the greater part of them, were not worthy to be moved at the bar, nor remembered at the bench: and that this case was adjourned to the Exchequer-chamber by the Justices of the King’s Bench, more for the weight of the value, than for the difficulty of the law in the case.” The case, however, is dealt with at great length. The fourth of these objections was:—

“The place of every corporation ought to be certain, for without a certain place there cannot be any incorporation; but here the licence to Sutton is to found an hospital ‘at or in the Charter-house;’ so that he may found it in all or any part of the same house, and therefore till Sutton has founded it in certain, there is not any certainty of the place, and by consequence no corporation. To which was added, that a place by a known name is not sufficient to support the name of an incorporation, but it ought to be described by metes and bounds; and divers precedents were cited and shewed, where the scites of hospitals, priories, etc. were so particularly described.”

And it is in what is, in the marginal note, called “Answer to the fourth objection,” that the words always relied upon, and I may perhaps say solely relied upon, for seeking to have attributed to a “charter-company” all the powers of a legally competent person, are found. I read them, with the whole context, so that if anything can be found in them lending any kind of aid to the respondent’s contention it may be picked, and pointed, out; and, I should add, they comprise only much the lesser part of this “answer,” which, in turn, is but a comparatively small part of the whole case:—

“Vide for this word *guild* or fraternity in the Book of Entries, 68. 37 E. 3. c. 5. 15 R. 2. c. 5. the statute of 1 E. 6. of Chantries. In which three things were observed: 1. How *prudens antiquitas* did always comprehend much matter in a narrow room. 2. That to the creation of an incorporation the law had not restrained itself to any prescript and incompatible words. 3. That when a corporation is duly created, all other incidents are *tacite* annexed. And for direct authority in this point in 22 E. 4. Grants 30: it is held by Brian, Chief Justice, and Choke, that corporation is sufficient without the words to implead and to be impleaded, etc. and therefore divers clauses subsequent in the charters are not of necessity, but

only declaratory, and might well have been left out. As 1. By the same to have authority, ability, and capacity to purchase, but no clause is added that they may alien, etc. and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, etc. that is also declaratory, for when they are incorporated, they may make or use what seal they will. 4. To restrain them from aliening or demising but in certain form; that is an ordinance testifying the King's desire, but it is but a precept, and doth not bind in law. 5. That the survivors shall be the corporation, that is a good clause to oust doubts and questions which might arise, the number being certain. 6. If the revenues increase, that they shall be employed to increase the number of poor, etc. that is but explanatory, as appears in the case of Thetford School in the Eighth Part of my Reports, f. 131, a. 7. To be visited by the governors, etc. that is also explanatory; for in this case the poor which shall be resident in the house of the Charter-house shall not be incorporated, but certain persons in whom the possessions are vested, who shall not be resident there, but only to have the general government and ordering of the poor therein; so that this case is out of the statutes of 2 H. 5. c. 1. and 14 El. c. 5, for if no visitor had been appointed by the charter, the governors should visit; and the books in 8 E. 3. 28. and 8 Ass. 29. do not gainsay it, where it is held, that if the hospital be lay, the patron shall visit, and if spiritual, the bishop shall visit, so that every hospital is visitable; it is true, but in the case at the bar the poor of the hospital are not incorporated, and so no legal hospital. 8. To make ordinances; that is requisite for the good order and government of the poor, etc. but not to the essence of the incorporation. 9. The exemption from the ordinary is but declaratory, for being a lay incorporation he neither can nor ought to visit. 10. The licence to purchase in mortmain is necessary for the maintenance and support of the poor, etc. for without revenues they cannot live, and without a license in mortmain they cannot lawfully purchase revenues, and yet that is not of the essence of the corporation, for the corporation is perfect without it, so that by what has been said, it appears what things *in genere* are requisite to a complete body incorporate, and which are *verba operativa* in this case (which are necessary to be known in every case), in the resolution whereof it appears how necessary it is, that the law and experience should join with their hands together."

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It is quite clear from all this that no such question as that raised here was even remotely involved in that case, and that the learned author was not dealing with it directly or indirectly. And, taking every word of it to be accurate—though, for one instance, Mr. Brice has found that that which is said to be “direct authority in this point,” is not such, but is only the repetition of an error occurring in Fitzherbert’s Abridgment—where is anything to be found in it that is anything like authority for the respondent’s contention? But, if all other “incidents” are tacitly annexed to a corporation, how does that alter the nature of the corporate body? Turn an hospital into a milliner’s shop? Can all other incidents of an hospital be more than all things necessary or expedient for its life as a hospital? I find myself unable to refrain from giving some expression to the thought that, if any of the very eminent men who composed the board of governors of the Hospital of King James, more commonly called the Charterhouse and Sutton’s Hospital, of whom the learned author—Lord Coke—was one, had been told that in the 20th century, in the heart of the North American continent, it would be judicially considered, upon the authority of *Sutton’s Hospital Case*, that that board of governors might not only, under their charter, do all things incidental to the existence of the hospital, but might also carry on the trades of milliners and hair-dressers as well as those of tinkers, tailors, and candlestick-makers, and anything else that a human being could, and do all things incidental thereto, he could but have said that they proved that wondrous things might happen in those parts, in those days.

I find not a word in that case to warrant the assertion that any corporate body has all the legal capacity of a human being, or any greater capacity than that which it needs “in acting up to the end for which it was created.” Mr. Brice in his book on *Ultra Vires* seems to me to have dealt with this subject in an accurate and satisfactory manner: Part II. chs. 4 and 5: and Part III. ch. 10, sec. 4: and in a manner quite in accord with the views of the Courts, and of business-men generally, in this Province, always.

I must continue of the opinion that it ought not to be seriously argued that a company incorporated, no matter how, for a single definite purpose, can lawfully act as a person, in no way limited, could: that, for instance, if incorporated for the purpose of carry-

ing on the business of mining only, it could lawfully carry on the business of butchering only: and I cannot but think that any such argument would be considered ludicrous by business-men.

"The general duties of all bodies politic, considered in their corporate capacity, may, like those of 'natural persons,' be reduced to this single one, that of acting up to the end or design, whatever it be, for which they were created by their founder:" Blackstone's Comm., vol. 1, pp. 479, 480.

"A corporation is a creature of the charter that constitutes and gives it being, and prescribes bounds and limits of its operations, beyond which it cannot regularly proceed: yet there are some things incident to a corporation, which it may do without any express provision in the Act of incorporating:" Bacon's Abridgment, vol. 2, p. 260. "A chartered company is a corporation existing for the purposes for which it is created and no others. . . . The charter of a company is a law set to it and to the individuals composing it, and they have no power by any agreement among themselves to annul or legally do anything at variance with their charter:" Lindley's Law of Companies, 5th ed., p. 98. "Each member is entitled to say to the others, 'I became a member in a concern formed for a definite purpose, and upon terms which were agreed upon by all of us, and you have no right, without my consent, to engage me in any other concern, or to hold me to any other terms, or to get rid of me, if I decline to assent to a variation in the agreement by which you are bound to me and I to you.' . . . This principle is applicable to all partnerships and companies, whether great or small, and is evidently one which requires only to be stated to be at once assented to as being just:" *ib.*, p. 319. I read these statements in answer to such as were referred to by the Judge of first instance in the case of *British South Africa Co. v. De Beers Consolidated Mines Limited*, [1910] 1 Ch. at pp. 374-6, and which have been repeated here; and call attention to the fact that there is nothing in any of the cases referred to indicating that the charter under consideration was one limited to a single purpose: or that the power which it was said the company had was not one connected with the purpose of the incorporation: and that, when that case was considered in a Court of Appeal, that Court abstained from approving of the views of the Judge of first instance, although, if they had, it would

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have been perhaps the better way of affirming the judgment in appeal, as well as that the views of Blackburn, J., expressed very fully on several occasions, upon the subject, did not receive even the damning quality of faint praise when brought prominently before the House of Lords in such cases as *Ashbury Railway Carriage and Iron Co. v. Riche*, *supra*.

And one turns with relief from the muddle of judicial, and law-book authors', dicta, in England, upon the subject, to the clear, consistent, and business-like manner in which the subject seems to have been dealt with in the Courts of the United States of America, of which it is said that: "Judicial decisions abound in the general statement of doctrine to the effect that corporations possess only such powers as are expressly granted, or such as are necessary to carry into effect the powers expressly granted:" Cyclopædia of Law and Procedure, vol. 10, p. 1096, where it is also said that: "'A corporation,' said a great jurist in a great case, 'being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence,'" referring to the judgment of Marshall, C.J., in the case of *Dartmouth College v. Woodward* (1819), 4 Wheat. (U.S.) 518, at p. 636. Again: "'A corporation can make no contracts, and do no acts either within or without the State which created it, except such as are authorised by its charter:'" *ib.*, p. 1099.

And, regarding the effect of transactions beyond the scope of their corporate capacity, the rule, and the reasons for it, seem to be established with equal clearness and certainty. "Perhaps the most general statement which can be made of the doctrine of *ultra vires* is to say that a contract of a corporation which is unauthorised by, or in violation of, its charter or other governing statute, or entirely outside of the scope of the purposes of its creation, is void, in the sense of being no contract at all, because of a total want of power to enter into it; that such a contract will not be enforced by any species of action in a court of justice; that being void *ab initio* it cannot be made good by ratification, or by a succession of renewals; and that no performance on either side can give validity to the unlawful contract or form the foundation of any right of action upon it:" *ib.*, p. 1146. And: "'The reasons why a corporation is not liable upon a contract *ultra vires*, that is

to say, beyond the powers conferred upon it by the Legislature, and varying from the object of its creation as declared in the law of its organisation, are: 1st. The interest of the public, that the corporation shall not transcend the powers granted. 2nd. The interest of the stockholders, that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorised by the stockholders in subscribing for the stock. 3rd. The obligation of everyone, entering into a contract with a corporation, to take notice of the legal limits of its powers:’ *per* Gray, J., in the case of *Pittsburgh &c. R. Co. v. Keokuk &c. Bridge Co.* (1888), in the Supreme Court of the United States of America, 131 U.S. 371:” *ib.*, p. 1147. To which I may add an observation upon the wasted energy in setting out in the charter a definite purpose of the incorporation if that is not to control in any manner its capacity; as well as regarding the pleasure it must be to a shareholder to put his money into a company incorporated for a purpose dear to his heart and find it employed only for a purpose which he detests. It is no answer to say he can sell out; it may be that he cannot; and why should he be so driven out, if he could sell? And it might be done without his knowledge.

Cases such as this have been of very common occurrence in this Province, where, invariably I think, the rulings of its Courts have been quite in accord with those of the Courts of the United States of America, to which I have referred: indeed the ground which is taken by the respondent here was never, to my knowledge, raised or suggested, before; the whole subject of the capacity of provincial companies has been in recent years twice supposed to be thoroughly threshed out: *Canadian Pacific R.W. Co. v. Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 405; and *Bonanza Creek Gold Mining Co. v. The King* (1915), 50 S.C.R. 534, 21 D.L.R. 123: and so threshed out without a word being said on the point, until the last named case was heard in the Privy Council. And the last company’s case which was before this Court next before this case, was one in which this point, if a valid one, should have been decisive of it, yet the point was not relied upon, or mentioned, in it; so that we have long been very neglectful of the fact, and our duty, if it be the law that companies here have such unbounded capacity as the respondent contends for.

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A reference to two out of very many cases in this Province, one in the 1st and the other in the 50th volume of the reports of the Supreme Court of Canada, upon appeals from the Courts of this Province, indicates pretty fairly that the law here has been always quite in accord with that administered in the United States of America, upon this subject, and that the omnibus capacity notion is altogether an innovation disturbing "the peace of the law," to prevent which Sir Edward Coke assures us was one of his purposes in reporting "*The Case of Sutton's Hospital*."

In the case of *Bickford v. Grand Junction R. W. Co.* (1877), 1 S.C.R. 696, the learned Judge who expressed the judgment of the Court is reported to have said—p. 733: "Had the mortgage been given for any object foreign to or inconsistent with the purposes of the incorporation, then, no doubt, it would have been *ultra vires* of the company. A familiar instance of a railway company exceeding the limits of its undertaking, is afforded by a well-known case, in which such a corporation added to its legitimate business that of a line of steamships. Had this mortgage been given in aid or furtherance of any similarly unauthorised enterprise, it would, of course, have been *ultra vires*, but it is manifest that such was not the case here and that the sole object of the corporation was to attain the end for which it had been created."

And in the case of *Union Bank of Canada v. McKillop and Sons Limited*, 51 S.C.R. 518, 24 D.L.R. 787, a guaranty by the defendants was unanimously held by the Supreme Court of Canada, as it had been by the provincial Courts, to have been *ultra vires* of the company, which was, apparently, incorporated in just the same manner as the Bonanza Creek Gold Mining Company was incorporated.

I can find no reason, or authority, for saying that the law of this Province is as contended for by the respondent; or for saying anything which comes nearer to it than this: that a corporation created by charter, under the Crown prerogative, has, ordinarily, the ordinary capacity of a human entity in respect of such objects as are the subject of its charter, except in so far as limited, or restrained, by competent legislation.

No help is gained by mere assertion that "it is the law now:" nor in assertions that we are here to administer, not to make, the

law: assertions which may be dangerous; for, if they draw away our attention from the vital question, What is the law? they may lead us into the twofold error of (1) misunderstanding it, and (2) laying the blame of our mistake upon the Legislature, when we, not they, are the authors of any absurdities that may follow upon our misinterpretation of it.

I find that the transaction in question was one plainly without the purposes of the appellants' incorporation: and so one which they had no power to enter into, and that therefore the action should have been dismissed: accordingly I would allow the appeal and dismiss the action on this major ground.

And on the minor ground, too, I reach, easily, the same result. I find that the appellants never made the note sued on; that it is not their promissory note.

The facts are simple, and there is really no conflict of testimony upon any substantial point.

The plaintiff's son had been carrying on business as a provincial company under the name "The Edwards Electric Company;" the business, or part of the business, of which was the manufacture and sale of a garment makers' clothes-pressing device, under what was called the "Langton rights," though it appears that there were no patent rights in connection with it; that "Langton rights" was merely a name for the device. The son, or the company, or both, failed, and the plaintiff bought from the liquidator of the company these "rights" and such chattels as went with them. After that, the plaintiff sold these things to the defendant Menet, who is a brother-in-law and a cousin of the plaintiff's son; but Menet, too, failed, and these things were taken from him, apparently, under a chattel mortgage he had given of them; that is, taken by the father, but stored by him with his son. Menet then sought to get them back and to carry on the business again, and for that purpose negotiated with the son. Menet's scheme was another provincial company; and for that purpose he associated himself with the defendant Blackmore and with Mr. Burk, who is a solicitor, and a solicitor who had had some experience in the creation of these provincial companies. The purchase was made altogether by Menet, whom the plaintiff and his son naturally desired to aid. The new company was formed and named "Menet & Langton Limited:" and this company, not the appel-

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lants, received the goods, and, for a time, carried on the business of making "Langton pressing machines." The testimony of the plaintiff's son as to this is in these words:—

"Q. How did negotiations open for the agreement that gave rise to the note in question? A. Menet came to me and told me he was going to organise a company or get some people interested with him, and he wanted to know if I would make some arrangement with him whereby they wouldn't have to pay up cash; and, when that came to me, I had a cash offer from another party, and, owing to family connections, I said, 'We will give you a chance.'"

And Mr. Burk's testimony, which is not contradicted by any one, is as follows:—

"A. My company had nothing to do with it. The company never got anything from it. There was another company formed, the Menet & Langton Limited.

"Q. Was this transferred to that company? A. It was for that purpose.

"Q. Who promoted that company? A. Menet and myself.

"Q. Was a bill of sale made? A. We never got anything from the plaintiff except some stock and machinery; never got a transfer.

"Q. You got some stock and machinery? A. Yes.

"Q. You made no documentary transfer from the purchasers here to the new company? A. Never had any to transfer.

"Q. You got certain chattel property? A. That was handed over to the company.

"Q. You made no documentary transfer? A. No.

"Q. And consideration was paid, of course? A. I got some stock personally."

The appellants had no concern in, and got nothing whatever out of, the transaction. The "Langton rights" clothes-pressing machine was a business quite foreign to the land and insurance business of the appellants; and, so far as the evidence discloses the facts, quite unknown to them. Mr. Burk, who was their manager, put their seal upon the promissory note sued upon and signed it in their name "per" himself as manager. This was entirely unauthorised by the appellants, and was done to advance his own aims and gains only. The transaction was that of the new company, which Menet was to form, and which, with Mr.

Burk's aid, was formed, Burk being paid for all that was done by him by a gift of stock in the new company.

Nothing turns upon the onus of proof: that which is proved is all that is material now: but I may ask upon whom else than the plaintiff could the onus be, in such a case as this, upon a promissory note merely stamped with the name of the company and signed "per A. W. Burk, Mgr.?" Mr. Robertson could do nothing but take that onus upon himself, as he did, at the trial. The action is upon the promissory note only; and the defences are substantially a denial of the making of the note, and that, if made, there was no power to make it: see Bills of Exchange Act, sec. 51.

I am in favour of allowing the appeal, and of dismissing the action, on this ground also.

Appeal dismissed; MEREDITH, C.J.C.P., dissenting.

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CANADA BONDED ATTORNEY AND LEGAL DIRECTORY LIMITED v.
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Company—Director Acting as Travelling Salesman for Trade Publication—Remuneration for Services—Absence of By-law—Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 92—Misconduct of Travelling Salesman in Soliciting Employer's Customers for Similar Publication of his own—Right to Remuneration notwithstanding—Finding of Trial Judge as to Misconduct—Appeal—Divided Court—Pirating Publication of Former Employer—Attempt to Entice away Servants—Finding of Fact—Appeal—Injunction—Scope of.

The defendant L. was in the service of the plaintiffs, an incorporated company, publishers of a "List of Lawyers in Canada," from the time of the company's inception until the summer of 1916. He was employed as a travelling salesman, and was also a director of the company. About the 1st July, 1916, L. started an opposition business, in which he was joined by the defendant P., who had also been employed by the company from 1913 until the summer of 1916, and was also a director. Shortly afterwards, they formed a new company (the defendant company), and began the publishing of a "Canadian Guide to Bonded Lawyers," a book much like the plaintiffs' "List of Lawyers in Canada." The plaintiffs, by the first of the above actions, sought an injunction restraining the defendants from pirating the plaintiffs' book, soliciting their customers, etc. In the second action, the plaintiffs sought to recover from L. moneys received by him from and for the plaintiffs; these sums L. claimed as salary, but the plaintiffs set up that he was false to his charge, and so was not entitled to any wages, and also that, being a director, he was not entitled to receive anything from the plaintiffs without a by-law authorising the payment, and there was no by-law:—

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Held, in the second action, that, although there must be a by-law, and approval thereof by the shareholders, before a director can be entitled to pay as such (sec. 92 of the Ontario Companies Act, R.S.O. 1914, ch. 178), there is no reason why one who happens to be a director should not serve the company in another capacity, and receive reasonable remuneration therefor, without a by-law authorising the payment; *aliter*, if the services are such that only a director can perform them.

Review of the authorities.

The expression of the object of the enactment by MEREDITH, J.A., in *MacKenzie v. Maple Mountain Mining Co.* (1909), 20 O.L.R. 615, 621, viz., "that those who govern the company shall not have it in their power to pay themselves for their services *in such government* without the shareholders' sanction," approved.

The defendant L. was therefore *held* entitled to his salary as travelling salesman until the 1st July, 1916, with the exception of one-half of his salary for June, 1916.

The trial Judge found that the misconduct of the defendant L. had disentitled him to remuneration for his services; but in the appellate Court it was *held*, that, if L. was guilty of misconduct in June, 1916, by soliciting customers for his new venture while still in the service of the plaintiffs, that misconduct did not disentitle him to previously earned wages.

Review of the authorities.

Upon the question of fact whether L. had been guilty of misconduct in June, there was an equal division of opinion in the appellate Court—composed of four Judges; and, in the result, it was adjudged that the plaintiffs should recover \$100 only in respect of their claim to the moneys retained by L., with Division Court costs; L. to have the costs of the appeal, and the excess of his costs of the action, upon the Supreme Court scale, to be set off (Rule 649).

In the first action, the trial Judge found that use had been made of the plaintiffs' material in the preparation of the defendants' production; that the defendants improperly retained the plaintiffs' list of subscribers; that the defendants surreptitiously obtained from the plaintiffs, lists of existing subscribers and of subscribers whose contracts had been cancelled; that the defendants had solicited the business of the plaintiffs' subscribers, in so doing using the lists, information, and material wrongfully and surreptitiously obtained from the plaintiffs; and that the defendants endeavoured to entice away employees from the plaintiffs; and he granted an injunction accordingly, and directed a reference as to damages.

In the appellate Court there was, in this action also, an equal division of opinion upon the question whether the evidence sustained the findings of fact of the trial Judge; and, in the result, the judgment of the trial Judge was affirmed in the main, with some modifications which narrowed the operation of the injunction.

THE first action was brought to restrain the defendants from soliciting customers of the plaintiffs and otherwise injuring the business of the plaintiffs as publishers of a directory containing lists of lawyers etc.

The second action was brought to recover from G. F. Leonard certain moneys which he had received for the plaintiffs while in their service, which he claimed to retain as salary.

The actions were tried together by FALCONBRIDGE, C.J.K.B., without a jury, at Toronto.

A. C. McMaster and E. H. Senior, for the plaintiffs.

J. P. MacGregor, for the defendants.

July 25, 1917. FALCONBRIDGE, C.J.K.B.:—I have had an opportunity since the 1st July of going over the voluminous evidence and the 80 exhibits put in at the trial.

The cases were argued with much force and skill on both sides, and at great (I do not say unnecessary) length. That argument was taken down by the official stenographer and has been extended.

The reconsideration of the whole case has confirmed me in the opinion which I had formed at the conclusion of the argument that the plaintiffs are entitled to succeed as to all matters in controversy in both actions.

It will be sufficient to point to the argument of counsel for the plaintiffs, which I approve of as to matters both of law and of fact.

The intrinsic evidence of the lists themselves shews conclusively the use made of the plaintiffs' material in the preparation of the defendants' production; and there is satisfactory and convincing evidence of: (a) the improper retention by Leonard and Parmiter, or one of them, of the plaintiffs' list of subscribers; (b) the surreptitiously obtaining from the plaintiffs type-written lists of present subscribers and of the plaintiffs' subscribers whose contracts had been cancelled, with dates and reasons; (c) the soliciting by the defendants of the business of the plaintiffs' subscribers, in so doing using the lists, information, and material wrongfully and surreptitiously obtained from the plaintiffs; (d) the individual defendants endeavoured to entice employees away from the plaintiffs, as charged in para. 21 of the amended statement of claim.

In the first action there will be judgment for the plaintiffs in terms of the prayer of the statement of claim and of the amended statement of claim, with costs, and a reference as to damages.

As to the action against Leonard alone, I find the facts in controversy in favour of the plaintiffs both as to the contracts and as to the matter of misconduct charged in the amendment to the reply and defence to counterclaim made at the trial, which misconduct disentitles the defendant to remuneration for his services. There must be a reference of this action unless the parties on this basis can agree on figures. Costs to the plaintiffs.

Both parties to have leave to amend the pleadings in accordance with the draft put in at the trial.

The defendants appealed from the judgment of FALCONBRIDGE, C.J.K.B.

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October 25 and 26, 1917. The appeals were heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

J. P. MacGregor, for the appellants. The defendant G. F. Leonard comes clearly within the rule laid down in *Re Matthew Guy Carriage and Automobile Co.* (1912), 26 O.L.R. 377, and *Burland v. Earle*, [1902] A.C. 83. The defendant Leonard was serving the company in a capacity not requiring a by-law for his employment. The by-law required by the statute applies only to remuneration received by a director *quâ* director, and the moneys paid to Leonard were not paid to him *quâ* director but as an employee of the company, and were fair wages for the services. As to the misconduct which it is charged disentitles Leonard to the recovery of salary, the case of *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339, shews that misconduct of the kind referred to only disentitles the employee from receiving remuneration for the current period of employment. The evidence shews that Leonard was guilty of no misconduct. The case of *Trego v. Hunt*, [1896] A.C. 7, is distinguishable upon its facts. In the other action, the defendants are entitled to succeed because, under the decisions in *In re Irish* (1888), 40 Ch. D. 49, and *Lamb v. Evans*, [1893] 1 Ch. 218, it is clear that Leonard and Parmiter were free, on termination of their employment with the plaintiff company, to engage with any competing company, and with the new company to use their knowledge of the details of the business, in methods and system, and of the personnel of the lawyers and laymen engaged in that business, which they had acquired in the employment of the plaintiffs.

A. C. McMaster and *E. H. Senior*, for the plaintiffs, respondents. As to the second action, the findings of the learned trial Judge, both as to the contracts and as to the matter of misconduct charged, are correct, and that misconduct disentitles the defendant to remuneration for his services. In the injunction action, the defendants sinned against the rule in *Trego v. Hunt* in canvassing the customers of the old business, as is shewn by the evidence, especially in the "common errors."

MacGregor, in reply.

February 18, 1918. RIDDELL, J.:—Appeals, argued together, from the judgments in favour of the plaintiffs in two cases tried

together by the Chief Justice of the King's Bench without a jury at Toronto.

The Canada Bonded Attorney and Legal Directory Limited (which is hereinafter called "the company") have for some time published a "List of Lawyers in Canada" whom they recommend to their customers to make mercantile collections—these lawyers they "bond" with a guarantee company, and undertake to their customers for the solvency and honesty of the lawyers they recommend. They, in the same publication, furnish a list of banks through which their customers may draw on debtors, the instructions being given to the banks that in case of non-payment the claims are to be handed to the "bonded" lawyer of the place. The company also have customers who make use of this system.

It naturally follows that only one lawyer or firm of lawyers will be "bonded" for any place, and that small places may not have a "bonded" lawyer at all; customers having claims to collect in such small places would be referred to a bonded lawyer in a near place who could attend to the matter.

Leonard, the defendant, was in the employ of the company from its inception, as a traveller, and later became also a director; he remained in this employ till the summer of 1916. The defendant Parmiter was from 1913 till the summer of 1916 also in the employ of the company.

About the 1st July, 1916, Leonard started an opposition business, and almost at once Parmiter joined him. Shortly afterwards, they formed a joint stock company (hereinafter called "the new company")—Leonard-Parmiter Limited—and began the publishing of a "Guide to Bonded Lawyers" much like that of the plaintiffs. An action was brought by the company against the two former employees and the new company for an injunction, etc. This is the first of the two actions now under appeal.

During the time Leonard was in the employ of the company, he received from and for the company considerable sums of money; these sums he claims as salary, while the company set up that he was false to his charge, and consequently is not entitled to any wages; the company also say that there is no by-law for the payment of anything to him, and that, being a director, he is not entitled to receive anything. They accordingly sue him for the moneys. This is the second of the two actions.

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Both parties desired that we should ask the learned Chief Justice as to the credibility of the defendants. I have done so; the learned Chief Justice informs me that his judgment was not based upon relative credibility, and that this Court is in as good a position as he to judge of the credit to be given to the witnesses.

It will, I think, be convenient to consider the second of the actions first. I have read the voluminous testimony and the still more voluminous exhibits; and, without setting out minutely everything, it seems to me that the material facts are these:—

Wharton, who was publishing a Legal Directory in Toronto, met Lamothe, a member of the Quebec Bar, in 1910, and they with others formed a limited partnership under the name "The Canada Bonded Attorney" to publish a bonded list; the first list appeared in 1912. About the same time, Leonard was employed as a canvasser; being dissatisfied with his remuneration, he in April, 1913, bought a quarter interest in the firm, through Lamothe, for \$500. Wharton, under the name of "The Canada Legal Directory," had continued to publish the Legal Directory; the parties determined to make a joint venture of the two lists and to form a joint stock company to carry on the enterprise. This was done; the plaintiff company was incorporated on the 22nd October, 1913, with (*inter alia*) the object, "to acquire and take over as a going concern . . . the business formerly carried on under the name of 'The Canada Bonded Attorney' and also under the name of 'The Canada Legal Directory.'" It took over the business of the partnership; Leonard received \$4,900 in paid-up stock for his quarter interest in the previously existing partnership, and went to Montreal to look after the business of the company at that end. After the formal proceedings of organisation, Leonard had become (November, 1913) a director and the vice-president and treasurer, Wharton the president, and Parmiter a director; Parmiter was given one share to qualify him, but later transferred that to Wharton, and got one share of preferred stock. The stock of the company was \$50,000, distributed by August, 1914, thus:—

Preferred

\$10,000.

Common

Wharton \$35,000.

Leonard \$5,000. \$40,000. \$50,000.

(There were 13 shares of preferred stock out.)

Leonard was the "representative at Montreal for the territory in Canada lying east of the counties of York and Simcoe;" Wharton, the president, acted as manager; and, while there was on paper a board of five directors, these two did all the business of the company, and were in all but name the company (subject to the rights given by the 13 preferred shares).

In May, 1914, a formal agreement was signed by the company, "R. A. Wharton, Mgr.," and Leonard, whereby it was provided that Leonard should, as the representative at Montreal, receive \$3,000 per annum, beginning on the 1st June, 1914; \$175 on the last day of each month and \$1,200, "covering three months' salary and expenses over Western Ontario, June, July, and August," payable on the 30th May, 1915, or within three months thereafter—also 30 per cent. of business for the year in excess of \$10,000. Leonard was empowered to collect accounts, and agreed to remit once a week. He paid his own expenses, and agreed to devote his whole time and attention to the company's business.

Admittedly there is no trouble about the year covered by this agreement, but Wharton was not quite satisfied with the results.

Leonard came to Toronto about the end of June, 1915, and it was arranged that he should finish up his eastern territory; he again (early in August) visited Toronto, and it was then arranged that he should try the West. There does not seem to have been a definite bargain as to terms, but I think there was an understanding between Wharton and Leonard, the only owners of the common stock, that each would take \$200 a month, and at the end of the year divide the profits.

We find Wharton, at a meeting of the board on the 9th June, 1915, suggesting that he be paid \$200 a month for the year ending on the 31st May, 1915.

The enterprise was a paying one. After paying the interest on the preferred stock, a dividend of 20 per cent. on the common stock was declared in August; and there is no reasonable ground for complaint against Leonard till after he went to the West in September, 1915; but the action is to recover from him moneys paid him by or for the company from and after the 1st June, 1915.

The first instance of alleged misconduct of Leonard was on the 2nd or 3rd June. Of the incident we have two versions: that given by Leonard (pp. 321, 322) is not really contradictory of that given

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by Parsons, for Leonard says (p. 321): "I have not any distinct recollection of just what I said to him." Parsons is quite clear; he was bookkeeper for the legal firm of S. D. & R. Leonard came in on the 2nd or 3rd June and asked for a renewal for a year of that firm's subscription to the plaintiffs. "After the renewal slip had been signed, he informed me that, together with a gentleman named Parmiter, he was going to issue a new book styled 'The Canadian Guide to Bonded Lawyers,' and asked if we would make a subscription thereto . . . the book would be up-to-date in every respect . . . he and Parmiter were leaving the company . . . to issue a new book." It may be that Parsons is mistaken in saying that the name of the new book was given; but I think we must accept this evidence in substance. The result is, that Leonard was, early in June, canvassing for an opposition book; and, while it is true that there is no difficulty in a firm of lawyers appearing in two books or a dozen, the chances are that only one will be chosen. It is not denied that, if Leonard did as he is alleged to have done, he was violating his duty to his employer. It cannot be said, I think, that in acting thus he was failing in duty in respect only of a separate and distinct part—it is true he obtained a renewal, but it was his duty to obtain that in such a way as not to prejudice its future renewal.

In the case of *Palmer v. Goodwin* (1862), 13 Ir. Ch. R. 171, it was argued that a land agent had faithfully collected the rents, and therefore he should not forfeit his whole remuneration; but the Lord Chancellor said (p. 173): "I cannot give my assent to the idea that the collection of rents is the whole duty of the land agent. He may very steadily and very faithfully collect and account for the rents, and yet very steadily and very completely destroy the estate."

In the present case, the defendant Leonard might very steadily and very faithfully collect and account for renewals or new business, and yet very steadily and very completely destroy the enterprise. For the month of June he should not be paid any salary at all; I think we may fairly infer that he continued on in June the work he began on the 2nd or 3rd of the month, of destroying the company's business.

But, while the rule is that, "where the agent's remuneration is to be paid for the performance of several inseparable duties, if

the agent is unfaithful in the performance of any one of those duties . . . it may be that he will forfeit his remuneration . . . where the several duties to be performed are separable," improper conduct "in connection with any of those duties would not, in the absence of fraud, involve the loss of the remuneration which has been fairly earned in the proper discharge of the other duties:" *per* Kennedy, J., in *Hippisley v. Knee Brothers*, [1905] 1 K.B. 1, at p. 9.

"Where the transactions between a principal and his agent are severable, and in some of them the agent has been honest whilst in others he has been dishonest, he is entitled to his commission in all the instances in which he has been honest, but is not entitled to it in the instances in which he has been dishonest:" *Nitedals Taendstikfabrik v. Bruster*, [1906] 2 Ch. 671 (head-note).

The rule that misconduct in one part of the duty does not necessarily disentitle to remuneration has been followed in our own Courts. For example, in *City Bank v. Maulson* (1871), 3 Ch. Chrs. 334, at p. 341, Boyd, Master in Ordinary (afterwards Sir John Boyd, Chancellor, *præclarum nomen*), says (p. 341), in speaking of compensation to trustees: "They do not forfeit all right to compensation because they have failed in some points of their duty." See also *Gould v. Burritt* (1865), 11 Gr. 523; *Hoover v. Wilson* (1897), 24 A.R. 424; *Kennedy v. Pingle* (1879), 27 Gr. 305; *McClenaghan v. Perkins* (1902), 5 O.L.R. 129.

Falsus in uno, falsus in omnibus, is not always true. I can see no reason why Leonard is not entitled to his salary till June (subject to the legal difficulty). He cannot have disentitled himself to previously earned wages by his conduct with Parsons more than if he had died then and there; and no one could say that that would be a bar to the recovery by his personal representative of the wages previously earned.

The legal difficulty bulks large in this discussion—the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 92, provides: "No by-law for the payment of the president or of any director shall be valid or acted upon unless passed at a general meeting, or, if passed by the directors, until the same has been confirmed at a general meeting." This was a change in 1912 by 2 Geo. V. ch. 31, sec. 90, the previous legislation having been for some time in

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terms finally appearing in the statute (1907) 7 Edw. VII. ch. 34, sec. 88: "No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting." This change was made to meet the difficulty that, under the existing legislation, a company could not pass such a resolution (as is pointed out in *Beaudry v. Read* (1907), 10 O.W.R. 622, at p. 625, followed and approved in *Mackenzie v. Maple Mountain Mining Co.* (1909), 20 O.L.R. 170; see pp. 172, 173; not reversed on this point in *S.C.* (1910), 20 O.L.R. 615.)

But there is no change in the terminology "No by-law for the payment of the president or any director . . .," and the authorities on the former law must be looked at on the point of the necessity to have a by-law before a director can be entitled to pay.

The first Ontario case to be noticed is *In re Ontario Express and Transportation Co.* (1894), 25 O.R. 587. There certain of the shareholders appointed themselves directors and elected a president, general superintendent, etc.; they passed a by-law that each director should receive \$500 per annum, and the president \$2,000. This was confirmed by a general meeting, and their appointment was considered to have been affirmed by legislation. At the meeting of directors, a resolution was passed fixing the salary of treasurer, general superintendent, etc.; this does not seem to have come before the general meeting.

The Master, in a winding-up, allowed the salary of the president, because it had the sanction of a by-law confirmed at a general meeting; but disallowed the others, as there was no by-law confirmed by a general meeting as to them.

Mr. Justice Rose held (pp. 589, 590): "I have not been able to come to the conclusion that such salaries would be within the proviso of sec. 12 enacting that no by-law 'for the payment of the president or any director' should be valid or acted upon until the same had been confirmed at a general meeting, for I am not of the opinion that where a director is appointed an officer of the company, he holds such appointment as director. It seems to me that the words referred to apply to the payment of money for the services of director *quâ* director, and of the services of the president as presiding officer of the board of directors, and that if a company choose to appoint a director to any salaried office, he holds such office, not as director or by virtue of his office as director,

but by virtue of his appointment by the board or the company as the charter or by-laws may provide." He held that the officers were entitled to a *quantum meruit* for services rendered the company during the time they held office.

The next Ontario case dealing with the matter is *Birney v. Toronto Milk Co.* (1902), 5 O.L.R. 1. A company had been incorporated; the plaintiff, at a meeting of (provisional) directors, had been by resolution appointed manager, at a stated salary, having been previously made a director. The company never went into operation, and the plaintiff never did anything from which the company received benefit. He sued and was allowed his claim by Lount, J.; this was reversed by a Divisional Court (Street and Britton, JJ.)

Street, J., at p. 6, expressly disapproves of Mr. Justice Rose's *dictum* as above set out, and says: "In my opinion we should hold the section as requiring the sanction of the shareholders as a condition precedent to the validity of every payment voted by directors to any one or more of themselves whether under the guise of fees for their attendance at board meetings or for the performance of any other services for the company. It is not conceivable that the Legislature intended to forbid the directors from voting small sums to themselves for their attendance at board meetings, without obtaining the consent of the shareholders, and at the same time to allow them to vote large sums to themselves for doing other work, without reference at all to the shareholders. The interpretation contended for by the plaintiff would in fact render the section nugatory, for nothing would be easier than to evade it. I think the section . . . should be held wide enough to prevent a president and board of directors from voting to themselves or to any one or more of themselves any remuneration whatever for any services rendered to the company without the authority of a general meeting of the shareholders."

Britton, J., goes on another ground, but he expresses no disapproval of the language quoted.

In that state of the law, I was called on to decide *Beaudry v. Read*, 10 O.W.R. 622. At a shareholders' meeting, they voted to certain directors stated amounts of the stock of the company "for services rendered to the company pending and since its incorporation." I held that the existing Act, 7 Edw. VII. ch. 34, sec. 88,

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by implication gave the power to the board of directors to pass such by-law (which, on the evidence, I held to be "remuneration to the directors for services rendered to the company"—see p. 624); and the shareholders were deprived of power to pass it. There was no necessity in that case to consider how the law would stand in a case like the present.

Then came *Benor v. Canadian Mail Order Co.* (1907), 10 O.W.R. 899, 1091. Benor became a director of the company, and was, by resolution of the board, elected managing director; the board also resolved that "the salary of the managing director and the secretary-treasurer until the company is in operation be fixed at \$150 each per month." No confirmation was had at any general meeting. He did not subscribe for stock, but did act as director. I held that I was bound by *Birney v. Toronto Milk Co.* to hold, and in conformity with my own independent opinion did hold, that the plaintiff could not recover the salary of \$150 per month.

Then came *Mackenzie v. Maple Mountain Mining Co.*, 20 O.L.R. 170, 615. A by-law was passed by the provisional directors that the president, vice-president, and directors should receive such remuneration for their services as might by resolution of the board be determined, and no further by-law or confirmation by the shareholders, other than the confirmation of this general by-law, should be necessary to provide for such remuneration. At a general meeting, this and other by-laws were confirmed by the shareholders; at a subsequent meeting of the shareholders, a resolution that a salary of \$100 a month should be paid to the president was carried; and at a meeting of the directors held thereafter a motion to the same effect was carried. The president sued for \$100 a month. Mr. Justice Clute dismissed the action. On appeal the King's Bench Division, in a majority decision (Falconbridge, C.J., and Sutherland, J.—Britton, J., dissenting), sustained the judgment at the trial. Britton, J. (p. 175), thought "that the statute was virtually complied with." In the Court of Appeal, Osler, J.A., held (p. 617) that the object of the section relating to payment of the directors or the president of the company for their services was that the authority or approval of the shareholders should be obtained before that was done; it was not to depend on the authority of the directors alone; and (p. 618) that "in substance all that the Act requires has been done. The

mind of the directors has been expressed: so also has that of the shareholders, and exactly to the same purpose and with the same result." Meredith, J.A., considered (p. 621) that "the purpose of the enactment is that those who govern the company shall not have it in their power to pay themselves for their services in such government without the shareholders' sanction," and held (p. 620) that there had "been a literal as well as a substantial compliance with the terms of the enactment in question." Moss, C.J.O., Garrow and Maclaren, JJ.A., concurred without written opinion.

Re Queen City Plate Glass Co. (1910), 1 O.W.N. 863, was a case in which the president of the company claimed to retain a salary which had been paid him, *quâ* president—there had been no by-law confirmed by general meeting; and Middleton, J., held that the president was entitled neither to salary nor to compensation as on a *quantum meruit*.

In *Re Morlock and Cline Limited* (1911), 23 O.L.R. 165, a "dummy" director was employed by his company as a "commercial traveller." On the winding-up his assignee was disallowed a claim for salary as such commercial traveller. On appeal, I considered myself bound by *Birney v. Toronto Milk Co.* to hold that, in the absence of a by-law of the directors confirmed by a general meeting, the claim could not be sustained.

The most recent case is *Re Matthew Guy Carriage and Automobile Co.* (1912), 26 O.L.R. 377. F. M. Guy was a practical mechanic, and worked at manual labour in the company's shop, receiving a weekly wage of \$15; others were in similar subordinate positions, having been hired by Matthew Guy (the original proprietor) before the incorporation of the company and the taking over of the business. These were directors; and the Master in Ordinary ordered them to repay the amounts they had received from the company as their wages. This decision was reversed by Middleton, J., who considered that the statute must be held to apply to every case in which a by-law is necessary for the payment and to cover the remuneration of all officers of the company whose appointments should properly be made by by-law, but not to cases in which the director has acted as a mere workman or clerk, and has been remunerated at a rate not exceeding the real value of the services rendered at the ordinary market price.

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It will be seen that there is no decision binding upon us, but the matter is in this Court at large; there are dicta of great weight, which must be treated with all respect.

I think that the object of the enactment is correctly expressed by Meredith, J.A. (now Chief Justice of the Common Pleas), in the *Mackenzie* case, 20 O.L.R. at p. 621, viz., "that those who govern the company shall not have it in their power to pay themselves for their services *in such government* without the shareholders' sanction."

There is no reason, however, why one who happens to be a director should not serve the company in another capacity, as servant, clerk, bookkeeper, mechanic, etc., and receive reasonable remuneration therefor. It is of course the duty of every director, a duty which he owes to his company and to the other shareholders, to see to it that he does not receive too great a remuneration for such services as he does render.

If the services are such that only a director can perform them, e.g., attending board meetings or acting in other regards as a director, he can recover compensation, payment, for such services, only by complying with the statute; but, if he is employed in a subordinate capacity and at a reasonable figure, there is no necessity for a by-law confirmed at a general meeting.

There is nothing in the evidence which indicates, much less proves, that the salary agreed upon was excessive; the work done by Leonard was not done as a director, but as a clerk or subordinate; and I see no reason why he should not be paid. This is *à fortiori* in view of the fact that the arrangement for services and payment was made by and between those who held substantially all the stock, and were, in business parlance, if not in law, "the company."

I would allow this appeal with costs, with a reference to the Master in Ordinary (unless the parties can agree on a reduction of \$100 in the amount), to proceed on the basis that Leonard is entitled to wages, \$200 a month, and expenses, for all the time until June, 1916—the Master in case of a reference will pass on the costs of the trial and of the reference. There should be no costs of the trial.

In the other case, more facts require to be investigated, found, and considered; in the law we have the assistance of decisions in the English Courts, which we lack in the discussion above.

The relations between Wharton and Leonard seem to have been harmonious until January, 1916—when a “spat” took place between them, of no great significance perhaps, in itself, but indicating that there would probably have to be a separation in the not very distant future. Wharton undoubtedly was not quite satisfied thereafter with Leonard, and his letters shewed it. About this time, or perhaps a little sooner, Leonard made up his mind to sell out his stock in the company—I cannot say that there was any connection between the two facts. Leonard says he was ill and wanted to buy a house for his wife in case of his death. He offered the stock to Wharton, but Wharton declined, suggesting that it should be offered to Mr. Senior, the solicitor. He also declined; and Leonard sold all but one share (which he retained to qualify upon) to Lamothe, for \$2,500, secured by notes. The stock had in August, 1915, paid a dividend of 20 per cent. In March, 1916, at a meeting of the board of directors, a salary of \$6,000 per annum was given to Wharton. Leonard, finding this out, wrote on the 13th June, 1916, with his resignation of the office of vice-president and asking a salary of \$5,000 a year. The resignation was accepted, and the matter of salary etc. left in the hands of the president, Wharton—it was by that time, I think, recognised that Leonard would soon leave the employ of the company. I think that Leonard had already formed a plan of a new enterprise in opposition to that of the company. Parmiter had been employed as early as July, 1913; he, with Leonard, got out the 1914 edition, and they seem to have developed, either in whole or in part, what there was of system in the office. Parmiter remained in the office, but rather early in 1916 he began talking about leaving, and suggesting that Miss McGregor, another employee, should (if and when he left) go out and work for him; but I cannot find that there was any definite intention on his part to join Leonard till some time in July—on the 16th June, he was at a directors’ meeting, and was elected secretary-treasurer without salary. The 30th June saw the termination of Leonard’s connection with the company, and Parmiter made up his mind to join him at the end of July; however, when, early in July (apparently the 7th), he so informed Wharton, he was invited to go at once, which he did, joining Leonard on the 8th or 9th July.

They issued a circular to the customers of the company, that,

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"having resigned as vice-president and secretary-treasurer of the Canada Bonded, we will publish about September 1st the 'Canadian Guide to Bonded Lawyers.' This new collection service is the result of several years' experience, and will contain a number of new and exclusive features," etc., etc.

They formed a joint stock company for this purpose, "the new company" as I have called it—and the new company has been issuing an opposition list, carrying on an opposition business in every way.

We must, I think, approach the consideration of this case bearing in mind that Leonard, in November, 1913, received \$4,900 in fully paid-up shares of the common stock of the company, "in consideration of the transfer by Wharton and himself of the goodwill and assets of Canada Bonded Attorney and Canada Legal Directory to the company" (see minute-book of date the 5th November, 1913, of both directors and shareholders, and also the evidence), Parmiter being then a director and continuing so to be till July, 1916.

The case of *Trego v. Hunt*, [1896] A.C. 7, decides that one who sells the goodwill of a business may indeed set up an opposition business, but he must not canvass the customers of the business he has sold—this would prevent Leonard from canvassing any customer of the former business sold to the company—Parmiter becoming associated with Leonard, any act of his in the premises would be for the benefit *pro tanto* of Leonard, and would be in substance the act of Leonard's agent; consequently, he cannot be permitted to do what Leonard could not—nor may the new company, which is aware of all the circumstances of the case and cannot (under existing circumstances) be permitted to do what Leonard could not: *Goldsoll v. Goldman*, [1914] 2 Ch. 603.

But this by no means exhausts the case—there are many new customers since the sale to the company in 1913, and it is desired to restrain the defendants from canvassing them. This is not covered by *Trego v. Hunt*; the canvassing of such new customers is not a "derogation" from Leonard's assignment of goodwill. (Farwell, J., in *Curl Brothers Limited v. Webster*, [1914] 1 Ch. 685, at p. 687, considers the rule against canvassing old customers "the old principle that a man cannot derogate from his own grant"—perhaps a still more familiar maxim may be invoked—"You

cannot eat your cake and have it.") The question as to Leonard's right to canvass any customers of the old firm to which he belonged depends not on his status *quâ* vendor but *quâ* servant or agent. Of course, while he was for long a most important part of the company—in ordinary parlance—he was not the less the company's servant or agent in law—nor does his position as director and (or) vice-president help him: *Measures Brothers Limited v. Measures*, [1910] 1 Ch. 336. It is clear law that an agent on leaving his employment has no right to use materials obtained by him in the course of his employment against the interests of his previous employer. "Such a use is contrary to the relation which exists between principal and agent. It is contrary to the good faith of the employment, and good faith underlies the whole of the agent's obligations to his principal:" *per* Lindley, L.J., in *Lamb v. Evans*, [1893] 1 Ch. 218, at p. 226. "The principal has . . . such an interest in them as entitles him to restrain the agent from the use of them except for the purpose for which they were got:" *ib.*

He may, however, make use of knowledge he may have acquired (except in secret formulæ etc., as in such cases as *Amber Size and Chemical Co. Limited v. Menzel*, [1913] 2 Ch. 239), or any skill, manual or intellectual—he "is perfectly entitled, when he starts as a rival in business to the plaintiff, to carry it on in the same way as his principal does. He has learnt to do it, and he is entitled to the benefit of that knowledge:" *per* Lindley, L.J., in *Louis v. Smellie* (1895), 73 L.T.R. 226, at p. 228. "If the defendant happens to remember that there is an agent whose address he can find out from ordinary directories, he is at liberty to do it:" *ib.* The Court will not enjoin him from using that which he can obtain "by an effort of memory" (*S.C.* at p. 226, *per* Kekewich J.), aided by books of reference etc; the form of the injunction would be "from making use of any copies or extracts from the plaintiff's books etc. or any memorandum made or obtained by the defendant when in the plaintiff's employ relating to any person named in the said books etc." He may not canvass any customer whose name he has from material obtained or retained in fraud of his employer: *S.C.*; also *Helmore v. Smith* (1886), 35 Ch.D. 449; but I can find no authority for the proposition that he may not as fair competition canvass those he may remember, even though he first met them when in the previous employ.

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I am satisfied, from an examination of the books and a careful perusal of the evidence, that the defendants or one of them had and used a copy of the plaintiffs' lists etc. They have or have had a good deal more in some shape of the plaintiffs' material than they admit—probably all this is no longer in existence, but I think that it did at one time exist. It is needless to dilate on the almost insuperable difficulty of proving such matters; that is notorious.

The judgment in appeal is in some respects too broad.

(2) And this Court doth further order and adjudge that the defendants do also, within the time aforesaid, deliver to the plaintiffs, or to whom they may appoint, all writings (including typewritings) in the possession of the defendants, or any or either of them, containing matter or information compiled from or obtained through the connection of the defendants Leonard and Parmiter or either of them with the plaintiff company.

This should be limited to "matter or information compiled from or obtained through" written memoranda or other documents obtained in connection with the business.

(3) And this Court doth further order and adjudge that the defendants do, within the time aforesaid, deliver to the plaintiffs, or to whom they may appoint, all contracts obtained by the defendants or any or either of them by personal canvassing or circularising or otherwise approaching the subscribers to the plaintiff company's publication known as "Canada Bonded Attorney," or lawyers or subscribers who had business connections with the plaintiffs, or were subscribers of the partnership or patrons of the business known as "Canada Bonded Attorney."

This is also too broad; such contracts as have been obtained by canvassing the customers of the business acquired by the company in 1913, and by canvassing those whose names have been obtained from written memoranda improperly obtained, are all that can be claimed.

(5) And this Court doth further order and adjudge that the defendants George A. Parmiter and George F. Leonard be and they are hereby restrained from reducing to writing or utilising or communicating to others information used in connection with and relating to the business of the plaintiff com-

pany, obtained by the said defendants Parmiter and Leonard by virtue of their employment by and connection with the plaintiff company.

This must be limited in the same way.

As to the claim for enticing servants, I do not find that any damage has ensued; the servants did not leave the plaintiff company.

The claim is made that the defendants induced customers of the company to break their contracts. However the law may be in respect of others than agents etc. persuading persons to break their contracts—as to which see *Flood v. Jackson*, [1895] 2 Q.B. 21, especially at p. 37, *Lyons v. Wilkins*, [1896] 1 Ch. 811, at p. 816—it is admitted that for an agent to do so would be a breach of the duty he owes his former employer.

It seems to me that this has been proved against the defendants.

(7) And this Court doth further order and adjudge that the defendants and each of them, their officers, servants, agents, and employees, be and they are hereby restrained from canvassing the plaintiff company's subscribers and lawyers, and from enticing parties having contracts with the plaintiff company to break their said contracts.

This must be limited as to canvassing as hereinbefore stated—the remainder may stand.

(8) And this Court doth further order and adjudge that the defendants, and each of them, their officers, servants, agents, and employees, be and they are hereby restrained from enticing employees of the plaintiff company to break their contracts whether by leaving the plaintiff company's service or by revealing information relating to the plaintiff company's business or otherwise.

This is wholly proper—there were attempts, however unsuccessful, to entice away servants, and an injunction is proper in such a case.

(9) And this Court doth further declare that the plaintiffs are entitled to recover damages from the defendants in respect of the canvassing by the defendants and each or any of them, their officers, servants, agents, and employees, of all subscribers of the plaintiff company and lawyers having business relations with the plaintiff company, and for and in respect

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of the enticing of servants and employees of the plaintiff company and other persons to break their contracts with the plaintiff company, and doth adjudge the same accordingly.

As to canvassing this must be limited as above; damages for enticing must be eliminated. I doubt very much if the company will be able to prove damages of any moment, but it may take its chances (if so advised) of being able to prove something substantial.

I think it is plain that the book "Canadian Guide to Bonded Lawyers," in its present form, is in fraud of the company's copy-right, and that an injunction should go, but not quite as in the judgment appealed from.

(1) This Court doth order and adjudge that the defendants do, forthwith after service hereof, deliver up to the plaintiffs, or to whom they may appoint, all copies of the volume book and list of names known as "Canadian Guide to Bonded Lawyers," and all publications of the same and of the material contained therein in the possession, custody, power, or control of the defendants, or any of them, or of which they have power to obtain possession from subscribers thereto or from parties to whom the same have been delivered by the defendants.

"All publications . . . of the material contained therein" cannot be restrained. Very much of this material may be, probably is, perfectly innocent and justifiable. I by no means think that all the material in the book came from the company's publications or material.

(6) And this Court doth further order and adjudge that the defendants and each of them, their servants, agents, and employees, be and they are hereby restrained from publishing the volume known as "Canadian Guide to Bonded Lawyers" in violation of the plaintiffs' copyright in the publication known as "Canada Bonded Attorney."

This is too sweeping. The present edition of "Canadian Guide to Bonded Lawyers" is objectionable in that it contains matter taken from "Canada Bonded Attorney" or from lists or other papers improperly obtained or retained by Leonard or Parmiter: its further publication and the further use by the defendants of "Canada Bonded Attorney" and the said lists etc.

must be restrained; but the defendants are not to be restrained from publishing new editions of "Canadian Guide to Bonded Lawyers" compiled from such sources as are open to them. The paragraph ought, therefore, to read somewhat as follows:—

" . . . from further printing, publishing, selling, delivering, or otherwise disposing of, the volume heretofore published by them and known as 'Canadian Guide to Bonded Lawyers,' and from copying or pirating from any edition of the plaintiffs' publication known as 'Canada Bonded Attorney' and any part thereof and any copy thereof and extract therefrom and from copying from any part of the plaintiffs' said volume copied or pirated as aforesaid and the copy and manuscript from which the same was printed and every copy thereof and extract therefrom in the preparation of or for the purpose of assisting in the preparation of any future edition of the defendants' said volume."

See Seton on Decrees, 7th ed., p. 655.

(4) And this Court doth further order and adjudge that the defendants, and each of them, their officers, servants, agents, and employees, be and they are hereby restrained from publishing the volume book and list of names known as "Canadian Guide to Bonded Lawyers," and from publishing the matter therein contained, and from in any way utilising matter reduced to writing or printing, including typewriting, obtained by the defendants, or any or either of them, from the plaintiff company, or obtained by the defendants, or any or either of them, in connection with and in relation to the business of the plaintiff company, or information relating to the business of the plaintiff company obtained by the defendants Parmiter and Leonard while in the service of the plaintiff company.

This clause must be modified as already stated above—"the matter therein contained" is too broad; as is "in connection with or in relation to the business of the plaintiff company;" while much "information relating to the business of the plaintiff company obtained by the defendants . . . while in the service of the plaintiff company," they are wholly entitled to use: *Louis v. Smellie*, 73 L.T.R. 226, at p. 228.

(10) And this Court doth further declare that the plaintiffs are entitled to an account from the defendants of all moneys

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received by the defendants, or any or either of them, on all contracts made by them with subscribers to the volume known as "Canadian Guide to Bonded Lawyers," and of all moneys derived from business in connection with the said volume, and doth adjudge the same accordingly.

This must also be limited as indicated above.

(11) And this Court doth further order and adjudge that it be referred to the Master in Ordinary to take an account of the amount of the damages payable by the defendants to the plaintiffs, having regard to the declarations aforesaid.

This may stand; but I do not think that the plaintiff company will consider it worth the trouble and expense involved in taking this proposed reference.

The plaintiffs should have the costs of the trial; the appellants should have the costs of the motion to vary minutes (before the Chief Justice of the King's Bench) and the appeal therefrom; and, success being divided, I think there should be otherwise no costs of this appeal. Costs of the reference, if any, should be disposed of by the Master.

I venture to hope that the two companies may find some way to compose their differences and either combine or work in opposition without more than the usual friction between competing firms—the defendants have undoubtedly the right to make and publish a list, to become and remain active competitors for business, although this time I think they have strayed from the right path.

Perhaps, upon the settlement of the order, it will be found that the most convenient course is entirely to rewrite the formal judgment, having regard to the foregoing declarations as to its proper scope. If that is found to be the desirable course, it may be followed. Whether it is followed or not, the order ought not to issue until it has been considered by me or by another member of this Court.

FERGUSON, J.A., agreed with RIDDELL, J.

ROSE, J.:—A perusal of the evidence does not satisfy me that the plaintiffs have proved either that Leonard, while in the plaintiffs' employ, was guilty of misconduct disentitling him to salary, or that the defendants, in preparing their book or in canvassing

for subscribers or otherwise, used the plaintiffs' book or any list or other paper taken from the plaintiffs' office or procured by Leonard or Parmiter while in the plaintiffs' employ.

The charge that Leonard so misconducted himself that he forfeited his claim to salary really comes down to this, that, while he was in Western Canada in the first half of the year 1916 as the plaintiff company's representative, he endeavoured to divert business from the plaintiff company to himself or to himself and Parmiter or to the new company which he had then made up his mind to form. Substantially, the evidence in support of this charge is the evidence of one Parsons, a clerk in the office of a firm of solicitors practising in Lethbridge. Parsons says that on the 2nd or 3rd June Leonard, calling at the office of Parsons' employers to procure a renewal of their contract with the plaintiffs, told him that he (Leonard) and Parmiter were going to issue a new book styled "The Canadian Guide to Bonded Lawyers," and solicited a subscription. I cannot credit this statement of Parsons; it seems to me to be displaced by his cross-examination, which shews that his memory is not to be relied upon, by the evidence of one of his employers, who contradicts several of his statements as to collateral matters, and by the evidence of the printers that the name "The Canadian Guide to Bonded Lawyers" was not the name first chosen for the defendants' book when it came to be printed later on. I think the fact is, as Leonard suggests, that what Parsons was really thinking of was the circular issued by the defendants after they commenced business, which circular he had forgotten about when he came to be examined as a witness in June, 1917. If Leonard was behaving in the way suggested, it is strange that there is no evidence of other instances.

No useful purpose would be served by my making an extended analysis of the evidence in support of the charge that the defendants, in preparing their book and in attempting to build up their business, made use of the plaintiffs' printed book and written lists; it suffices to say that there is no direct evidence that either Leonard or Parmiter had such a book or list in his possession after he left the plaintiffs' service, except a copy of the book which Parmiter says he bought at a later time; that the clerks who assisted in the preparation of the defendants' book corroborate the statements of Leonard and Parmiter as to the method adopted,

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in so far as that method would be within the knowledge of the clerks; that, with the other sources of information available, there would be no great difficulty in compiling the defendants' book in the way in which Leonard and Parmiter say it was compiled; that most of the instances of so-called "common error" in the two books are explained; and that the points of similarity between the two books do not seem to me to be surprising, in view of the fact that Leonard was largely responsible for the preparation of each. Of course there are many things that seem to arouse suspicion; but to my mind it is no more than suspicion, so that the case does not fall within the class of cases of which *Exchange Telegraph Co. Limited v. Howard* (1906), 22 Times L.R. 375, is an example, where one cannot "assign any reasonable possibility of the defendant having made exactly the same error," etc., except that he was improperly using the plaintiff's materials.

I understood Mr. MacGregor to say that he had no objection to the injunction against enticing away the plaintiffs' servants. It is therefore unnecessary to discuss the question whether that injunction was properly granted.

Except in so far as it is founded upon findings of fact adverse to the defendants in respect of the two matters above discussed, I concur in Mr. Justice Riddell's judgment, and in respect of those matters I concur in his statement of the law applicable to the facts that he finds to be established; my finding of fact, however, would lead to the conclusion that the period for which Leonard is allowed his salary of \$200 a month ought to include June, 1916, and that the injunction ought to be limited to enticing servants and to soliciting customers of the plaintiffs who were customers of the partnership whose business was transferred to the plaintiff company.

LENNOX, J., agreed with ROSE, J.

In the result, the appeal in the first action is dismissed, with a variation in the form of the judgment; costs as stated by RIDDELL, J.

In the second action, the appeal is allowed with costs; but the defendant Leonard is to be subjected to a deduction of \$100 from his salary, if the parties agree upon that sum; if they do not agree,

there is to be a reference to the Master in Ordinary, who will dispose of the costs of the reference; no costs of the trial.

Counsel spoke to the minutes of the judgment in the second action, that against G. F. Leonard, before RIDDELL, J., in Chambers.

April 10. RIDDELL, J.:—The parties not being able to agree on the judgment, I have consulted my colleagues and have gone over the matter again with care.

The judgment for the plaintiffs will be for \$100 only, without a reference. As to costs, the defendant will have the costs of the appeal, and the plaintiffs will have Division Court costs of their action, with a set-off of Supreme Court costs to the defendant, as referred to in Rule 649.

The defendant will have the costs, fixed at \$15, of settling the judgment.

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PEEL v. PEEL.

Husband and Wife—Interim Alimony—Property Conveyed by Husband to Wife—Lis Pendens—Wife's Ability to Maintain herself—Expected Gifts from Children—Statement that Husband Possessed of no Property—Right of Wife to Test by Issue of Execution—Quantum of Interim Allowance.

Upon an application for interim alimony the defendant set up that the plaintiff was able to maintain herself out of land which he had conveyed to her and out of moneys which her children might allow her. It appeared, however, that, although the plaintiff lived in the house upon the land conveyed to her, the land was tied up by the registration of a certificate of *lis pendens*, and the allowances from the children would, if made, be no more than compassionate gifts:—

Held, that what was thus alleged was no ground for setting aside an order for the payment of \$4 a week as interim alimony.

Eaton v. Eaton (1870), L.R. 2 P. & D. 51, and *Knapp v. Knapp* (1887), 12 P.R. 105, distinguished.

Held, also, that the defendant's statement on oath that he had no means out of which payment could be compelled, was no ground for setting aside the order—the plaintiff had the right to test the truth of the statement by an execution.

AN appeal by the defendant from an order of the Master in Chambers requiring the defendant to pay the plaintiff interim alimony at the rate of \$4 per week.

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February 15. The appeal was heard by MIDDLETON, J., in Chambers.

Edward Meek, K.C., for the defendant.

W. J. McLarty, for the plaintiff.

February 19. MIDDLETON, J.:—As usual, the defendant thinks he is in the right. The marriage took place twenty-six years ago. Eleven years ago he bought a house. In 1912, as he says with commendable frankness and sublime ignorance of the law, he, "being apprehensive of incurring liabilities in business which he might be unable to meet, proposed to the plaintiff, his wife, to make a conveyance of the land to her on the condition that she was to hold the same in trust for him." And, she agreeing, a conveyance was made. On his asking a reconveyance, to his consternation his wife ordered him to leave; and, upon his hesitating, "I was so beaten and bruised over the neck, shoulders, and arms, with a mop-handle or some similar instrument, that I was unable to work for several days."

The wife being thus left mistress of all she surveys, the husband started suit to recover the land, and has filed a *lis pendens*, so that it is tied up.

The wife wants alimony, and the husband sets up in answer the statement of the late Chancellor in *Knapp v. Knapp* (1887), 12 P.R. 105, 107: "The practice appears well settled that on application for interim alimony the Court will consider the question of the wife's ability to maintain herself out of separate estate or other sources of income—such as her own earnings . . . and allowances from her friends."

The separate estate the husband relies upon is the house—tied up by a *lis pendens*. In this the wife resides, and the Master rightly has reduced the allowance, as the wife has not to pay rent, though she must pay interest and taxes.

What is mainly relied upon is "allowances from her friends." The husband says that the eldest son will not see his mother starve, and he seeks to shift the maintenance of his wife from his own shoulders to his children. This is to parody what was said by the Chancellor. The case he refers to, *Eaton v. Eaton* (1870), L.R. 2 P. & D. 51, was a case where upon the marriage the wife's father agreed to pay £100 per annum to his daughter, and always paid

her this sum. The husband's income was less than this, and interim alimony was refused. The reasons given shew that there was an enforceable agreement by the father. The case has no bearing on mere compassionate gifts to an abandoned wife.

The case made by the wife differs widely from what the husband puts forward; but this is for the trial, and should not be now discussed. The husband, in my view, is getting off too easily—\$4 per week for the few weeks pending trial is a meagre allowance for a wife who has brought up a family of children and who has no earning capacity.

The final ground put forward is, that no means exist by which payment can be compelled. "I have no property, real or personal, of any kind. . . . I am unable to pay any sum to the plaintiff." This may be true, but the plaintiff has the right to test the truth by an execution.

Appeal dismissed with costs.

[KELLY, J.]

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Water—Erection of Dam in River—Maintenance and Operation Causing Injury to Owners and Occupants of Lands above Dam—Overflow of Water Retained and Stored—High Water-level—Neglect to Use Means to Reduce—Excessive Rainfall—Act of God—Action for Damages—Status of Plaintiffs—Occupants in Possession of Land—Power Company—Charter of Incorporation—Agreement with Government of Ontario—Damages.

It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable.

Greenock Corporation v. Caledonian R.W. Co., [1917] A.C. 556, followed.

By means of a dam constructed and operated by one of the defendant companies on the Rainy river at Fort Frances, the waters of the river and of Rainy lake were retained and stored for the defendants' purposes. In the winter and early spring of 1916, a large quantity of water was thus stored; and, when the spring floods came, the level of the lake was raised to an immoderate degree. There were unusually heavy rainfalls in the summer of 1916; and the waters above the dam were then so accumulated as to back up and overflow upon the premises of the several plaintiffs, situated above the dam, causing damage for which they brought this action:—

Held, upon the evidence, that, while the abnormally high water in the lake in the spring and summer of 1916 was not due solely to the defendants or to those controlling the dam, there were in the early part of the year, to the knowledge of those operating the dam, indications that the water-level would be high, and the probabilities of danger were increased by the

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positive actions of those operating the dam: (1) in holding back and storing immense quantities of water, filling up what would otherwise have been a receptacle for a like quantity of water produced by the spring freshets or excessive rainfall; and (2) in their persistent refusal and neglect to open the sluice-gates and waste-ways of the dam, which, if opened, would have drawn down large quantities of water.

The events which happened when the plaintiffs suffered the damage were not attributable to the act of God so as to relieve those who controlled and operated the dam.

Certain of the plaintiffs were not the owners, but merely the occupants, of portions of the lands damaged, but their possession was sufficient to enable them to maintain the action.

The Ontario company defendant had no right, by virtue of its charter of incorporation or its agreement with the Government of Ontario or otherwise, to back up the water to the extent to which it was backed in 1916, nor was it privileged to disregard the rights of owners or occupants above the dam.

The action was brought against a Minnesota company as well as the Ontario company, but the latter only was found to be liable to the plaintiffs.

The damages of each plaintiff were separately assessed by the trial Judge.

THIS action and four others were brought against the Ontario and Minnesota Power Company Limited and the Minnesota and Ontario Power Company, the plaintiffs being Matthew H. Smith, Seth Smith, Narcisse Gagne, Peter Foster, and John Tighe, to recover damages for injuries to their respective properties by the acts of the defendants. .

The five actions were tried together, without a jury, by KELLY, J., at Fort Frances.

C. R. Fitch, for the plaintiffs.

A. J. Andrews, K.C., and *F. M. Burbidge*, for the defendants.

February 20. KELLY, J.:—The defendants in each of these actions are the Ontario and Minnesota Power Company Limited and the Minnesota and Ontario Power Company.

The allegations in each of the separate actions (they were tried together) are: that the defendants erected and maintained a dam across Rainy river, between the town of Fort Frances, in the Province of Ontario, and the city of International Falls, in the State of Minnesota; that this dam impedes and interferes with the natural flow of the waters of Rainy lake, discharging through Rainy river, and maintains the level of the water in the lake above its normal height; that this dam was constructed and is maintained without any legal authority and in direct violation of the provisions of the Ashburton Treaty of August, 1842; that, during the fall of 1915 and the succeeding winter, and in the summer of 1916,

and down to the commencement of these actions, the defendants by means of the dam unlawfully held back the waters of Rainy river and Rainy lake until they reached an unduly high level, and in consequence the properties of the respective plaintiffs were either destroyed or seriously damaged; that the plaintiff in each action was deprived of the use of his buildings and from carrying on his usual avocation; and further, even if the defendants had the right to maintain the dam, that they maintained it in such a negligent manner as to cause the loss and damage already referred to. The plaintiff in each action claims damages in consequence.

On the 9th January, 1905, an agreement was entered into between His Majesty, represented by the Hon. The Commissioner of Crown Lands for the Province of Ontario, of the one part, and Edward Wellington Backus, of the city of Minneapolis, and those associated with him, who were therein called "the purchasers," of the other part, whereby the Government of the Province of Ontario agreed to sell and the purchasers to buy certain lands, and lands covered with water, in the town of Fort Frances and adjacent thereto, as therein further described and referred to, in consideration of the covenants and requirements therein contained; the purchasers covenanting and agreeing to construct a dam, conduit, or such other works on or near the said river at Fort Frances, in accordance with plans then attached, sufficient to develop power to the full capacity of the river, according to plans approved of by the Lieutenant-Governor in Council; such works to be of such design as would provide for sufficient waste-weirs to obviate the danger from jams, floods, or freshets; and that the dams, head-gates, waste-weirs, and works in connection therewith or incidental thereto, should not be proceeded with unless and until the plans, drawings, and specifications for the same should have been submitted to and approved of by the Lieutenant-Governor in Council. There was a further provision that, notwithstanding the approval of the plans attached to the agreement, the waters of Rainy lake should not at any time be raised to a higher level than should be authorised by the Government, and that the height of water to be maintained in the lake and the use or non-use of the flash-boards shewn on the plans should at all times be subject to such control and direction by the Government

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(meaning the Government of the Province of Ontario) as, in the opinion of the Government, would be necessary to insure the safety and protection of property. It was also provided that the purchasers should have the right to construct a separate dam at or near Kettle Falls, at the outlet of lake Namakan, and also at the outlets of Lower Manitou lake and Big Turtle lake, subject to such regulations and conditions as should be imposed by the Lieutenant-Governor in Council. Kettle Falls, lake Namakan, Lower Manitou lake, and Big Turtle lake are all situate several miles above the dam at Fort Frances, either on Rainy lake or streams tributary to it. The height of water to be maintained in these lakes at all times was to be subject to the control of the Lieutenant-Governor in Council. One other important term of the agreement was, "that the lands, rights and privileges mentioned in this agreement are confined solely to the lands, rights and privileges the property of the Crown in Ontario under the control and administration of the Government of Ontario, and that no permission is given to the purchasers to overflow or cause to be overflowed any lands not the property of the Government of Ontario and not under the control or administration of the said Government, and if any damage is done by the erection of any dam or the construction of any works under this agreement, no recourse shall be had against the Government in respect thereof."

I mention specially these several provisions as reference was made to them both in the evidence and argument.

The intention was, at the time, that the purchasers should incorporate a company to take over the rights and privileges which they acquired under this agreement. By letters patent dated the 11th January, 1905, the Ontario and Minnesota Power Company Limited was incorporated, with power to acquire, maintain, utilise, and develop water power and other power for the production of electricity and of electric, pneumatic, and hydraulic power or force for any purpose for which electricity or power could be used, and to construct, maintain, and operate works and appliances for that purpose, and to do several other acts and things incidental to such undertaking, as set out in the letters of incorporation.

By indenture of the 28th January, 1905, between Edward Wellington Backus and the company so incorporated, Backus

granted, assigned, and set over unto it, the above mentioned agreement and all the lands and water powers therein mentioned, and all the benefits and advantages appertaining thereto, together with all powers, rights, privileges, etc., thereunder.

The dam was constructed across the Rainy river immediately above the Falls at Fort Frances, extending from the town of Fort Frances, on the Canadian side of the river, to the city of International Falls, in the State of Minnesota; the Ontario and Minnesota Power Company Limited and a company incorporated within the United States own or control it. The two companies are, for practical purposes, under the same control and management.

This dam so controls the waters flowing through Rainy lake into and through Rainy river as to make them available for development of power and the operation of industries which are carried on by the Ontario and Minnesota Power Company Limited and other companies.

The plaintiffs Matthew H. Smith, Seth Smith, Gagne, and Foster are fishermen, carrying on their business independently of each other, in the waters of Rainy lake or its tributaries, several miles above the town of Fort Frances. The plaintiff Tighe is a store-keeper, owning and occupying premises in the town of Fort Frances.

For the purpose of providing a sufficient supply of water to carry on the operations of the Ontario and Minnesota Power Company Limited and others using power generated at the dam, in the dry seasons of the year resort is had, by means of the dam, to holding back and storing quantities of water in Rainy river and Rainy lake, and also, as supplemental thereto, storing water in lake Namakan, held there by a dam at or near Kettle Falls. This condition of things prevailed in the winter and early spring of 1916.

There was then backed up by the dam, and stored in the lake and river above it, an immense quantity of water which would not have been there but for the dam. The quantity so stored was almost seventy billions of cubic feet. The effect of the presence of this enormous quantity was to raise the lake-level at the rate of about one foot for every ten million cubic feet of stored water. The natural disposition of the water being thus interfered with, any unusual inflow to the lake and the river and streams tributary

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to it was fraught with dangerous consequences; in fact with the great storage capacity filled there was danger from even the normal inflow of the spring, unless precautions were taken in handling the water by those who had it under control. Conditions due to temperature, rainfall, prevention of "run off" by the frost, were such as to make it reasonably apparent from about the end of 1915, to those familiar with the locality, and particularly to those whose interests were dependent upon water supply, and who would reasonably be expected to foresee the prospects of excessive precipitation, that the large quantities of snow and ice which had then accumulated and were accumulating would, when let loose by the thaws of the spring, result in an unusual flow of water into and through the lake and river towards the dam at Fort Frances. This very state of things came about when the spring floods came down, and, with the water already stored, raised the level of the lake to an immoderate stage even for that time of the year.

This state of things was accentuated by heavy rainfalls in the summer of 1916. The waters above the dam were then so accumulated as to back up and overflow upon the plaintiffs' premises, causing the damage for which they now make claim.

The defendants, in justification of the part they played in what happened, have set up that whatever loss or damage was sustained by the plaintiffs was due to natural conditions or to some act or condition over which they had no control, and for which they should not be held responsible; that any unusual flooding or rise in the level of the lake was due to the act of God, or to causes for which they were not accountable; and they deny that the dam impedes or interferes with the natural flow of the waters of Rainy lake, or that it maintains these waters above their normal level.

That the inflow of water in 1916 was unusual is beyond doubt; and, if the conditions which prevailed in the lake and in Rainy river had been traceable solely to the natural causes referred to, the plaintiffs would not have just cause to complain against the defendants. Two elements, however, enter into the consideration of these cases, both influencing in a most material way the condition from the end of 1915 and the beginning of 1916 until the time when the plaintiffs sustained the damage for which they now seek to make the defendants liable. Both were due to the acts of those in control of the dam or their failure to perform what

was their plain duty: one was the holding back, by means of the dam and for their own purposes, of these immense quantities of water in the lake and the river; the other, the manner in which the dam and the gates and sluiceways forming part of it were operated.

The consequences of these unusual conditions could have been modified, if not altogether averted, by a proper manipulation of the gates of the dam, especially if acted upon promptly, so as to increase the discharge into the lower river of the already pent-up waters. The discharge capacity of these gates, if all were open, and through the water-wheels of the mills at the dam, is at least 43,000 cubic feet per second. A sudden opening of all when the water was at an exceptionally high level would have probably had a very damaging effect upon property below the dam, and would perhaps have entailed risk of injury to the dam itself; but no such serious consequences would have followed if, earlier in the season, they had been even partly opened to enable the excess water in the lake to be drawn down, or if the defendants had heeded the warnings and followed the orders that were given them later on.

The water-level is there calculated with reference to a benchmark on a near-by rock, placed arbitrarily at 500. The crest of the dam is at 497, so that at 497½ there was 6 inches of water running over it. The height of the lake above the dam would then be 497.95; but for the water held in storage, the level would have been several feet lower than it then was.

From the 1st January, 1916, when the lake-level was 497.15, until the 23rd April, there was no discharge at the dam, except through the mill-wheels, and in all that time the discharge was less than it would have been if the river had remained in its natural state.

The defendants did not commence to open any of the gates until the 26th April; and from that time the extent of the opening was reluctantly increased.

In the spring and early summer, when to even a casual observer it must have been apparent that the water-level was high and there was reasonable probability that it would go still higher, and when every indication pointed to necessity for precaution being taken to prevent impending danger, the defendants were warned and requested to open the gates of the dam so as not only to prevent a further rise in the water-level, but also to draw down

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the waters which had been threatening damage to those along Rainy river and the shores of the lake. No one knew better than the defendants what the probable result would be from the unusual conditions which prevailed in the fall of 1915 and the early months of 1916; and one would have thought it the reasonable thing that they would have made preparations to meet the very contingency which followed.

They were warned from other sources as well. On the 16th May, M. H. Smith, a plaintiff in one of these actions, wrote Mr. Backus, of the defendant companies, drawing his attention to the dangerously high water for that season of the year, due, as he said, to the defendants keeping their waste-gates closed in the dam, and pointing out that, "should we have the usual amount of rain this season and you do not open your waste-gates and keep them open, us (*sic*) fishermen will be all flooded out and will be compelled to stop fishing entirely."

On the 23rd May, Mr. Smallain, the resident engineer at Fort Frances of the Dominion Public Works Department, received instructions to insist that the power company open all sluices immediately at Kettle Falls and International Falls until flood conditions changed, and on the same day he communicated these instructions in writing to Mr. Backus and called upon him to act immediately. Evidently there was not an immediate compliance with the order, for later on the same day a further communication was sent stating that, as all control-gates and sluices in the dams at Kettle Falls and International Falls were not left wide open, he again asked for immediate action to be taken to comply with the terms of the earlier order. This order having been ignored, the Deputy Minister of Public Works, on the 24th May, telegraphed directly to the Minnesota and Ontario Power Company ordering all sluices and control-gates at Kettle Falls and Fort Frances to be opened immediately, and all to be kept open until the company was told to close them. The order was a peremptory one, demanding prompt compliance. The position taken in the telegram of the 25th May, in reply, was, that opening the sluices and gates would not afford material relief, and would necessitate closing the paper-mills on both sides of the International boundary-line, leaving two cities in darkness, and temporarily suspending the publication of about sixty-five leading newspapers in Canada and the United

States, and therein a counter-proposal was made to discharge to the fullest extent consistent with the operations of the mills, and a suggestion of delay until the conclusion of an investigation which it was said was then being made by two members of the International Joint Commission, who were then at the scene of the trouble. As a result of this and of a report to the Department by the Chairman of the Commission, the order was varied by directing the companies to increase the discharge by an additional 3,000 feet per second immediately until it was ascertained what effect the change would have. The concurrence of the Chairman of the Commission in increasing the discharge by 3,000 feet was merely a temporary expedient suggested by the flood conditions at the Lake of the Woods very many miles below Fort Frances dam; but even this moderated demand was not complied with, and the record of what occurred thereafter is conclusive that those having control of the dam operated it in wilful disregard of the consequences to those in the position of the plaintiffs, and aggravated the situation by their persistency in refusing to heed the warnings and to comply with the requests to open their gates.

Ordinary prudence should have dictated the advisability of holding down the water to the lowest possible point, if consideration were to be given to those whose interests lay above the dam, and who were in imminent danger of grave injury. I do not say that the abnormally high water in the lake in the spring and summer of 1916 was due solely to the defendants or to those controlling the dam; but I do find that there were in the early part of that year, to the knowledge of those operating the dam, indications that the water-level would be high, and that the probabilities of danger were accentuated by the positive actions of those operating the dam: (1) by their having held back and stored immense quantities of water, filling up what would otherwise have been a receptacle for a like quantity of water produced by the spring freshets or excessive rainfall; and (2) by their persistent refusal and neglect to open the sluice-gates and waste-ways at the dam, which, if opened, would have drawn down large quantities of water, and prevented the high water-level which resulted so disastrously to those now complaining.

It is contended, and it was intimated in the evidence, that those in control of the dam did not know of the likelihood of a flood

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prior to the 1st May. In the light of the whole evidence, I am altogether unable to accept any such suggestion.

Backus, the president of the defendant companies, a man of capacity, with a familiarity and thorough knowledge of every phase of his business interests—I speak from having heard him give his evidence—explains what his knowledge was when he made this statement:—

“In the fall of 1915 we had quite heavy precipitation just before it froze up, and the streams were filled with water, so that the earth was thoroughly saturated and the streams filled, and when the frost came it was just like a coat of ice over the whole saturated area, and about the 1st to the 10th November the snowfall was perceptibly greater than it had been since we commenced operating the dam here in 1910, and we did not have a thaw during the entire winter—in fact, I was up on the lakes, and they were hauling logs on sleds on the 10th April.”

Any suggestion that he did not know of these conditions until the spring of 1916, I refuse to accept.

A continuous supply of sufficient water to carry on the defendants' enterprises was of the highest importance; for, as Mr. Backus puts it, “We had always been very short of water, and the great problem had been to find out how to conserve the water in the rainy season so that it could be utilised in the dry season”—a statement which goes far to explain the persistency of those operating the dam in holding back the water in 1916.

Those in control of the defendant companies were familiar with the area from which the water flowed into Rainy lake and Rainy river. The president says he made a thorough investigation of the entire water-shed of the Rainy river and also of the water-shed of the Lake of the Woods, his lumbering operations having embraced the entire water-sheds of both.

Is it reasonable, then, to assume that the persons in control of the dam, knowing that this continuous supply of water was necessary, knowing too that the supply must be derived from the Rainy river area, and having a knowledge which Mr. Backus's “thorough investigation” must have afforded, would not be vigilant in keeping in touch with the conditions of precipitation, snowfall, prospects of sudden thaws, etc., on which sufficient or insufficient or excessive supply in the coming months so much depended?

I hesitate to accept the statement that these efficient businessmen, with the full realisation of the result to them of either insufficiency or excessive supply of water, were ignorant of the possible consequences of the conditions which prevailed in the early months of 1916 until these consequences were actually upon them. The simple facts are, that they created a state of things which, if not treated with care, was fruitful of trouble either to property-owners below or to property-owners above the dam or to both; and, to escape what might have been serious consequences to property below the dam if they increased the discharge of water, they inflicted serious injury and damage upon the plaintiffs, whose interests lay above the dam. Avoiding injury to the greater number cannot justify injury to the smaller number. They were confronted with conditions largely of their own creation. If they were to be held responsible for any of the results of the flooding, they no doubt chose what seemed to them the lesser evil. There was another reason as well why these companies over which Mr. Backus presided should desire not to discharge too freely into the lower river. He says: "We have saw-mills at Keewatin, and one at the inlet of the Lake of the Woods, where the river turns to the north and runs into the Lake of the Woods," points towards which the water flowing through or over the Fort Frances dam runs. Is it too much to assume that the defendants had in mind the probable danger to these lower properties of theirs, if excessive quantities of water were permitted to pass the dam? Add to this the position taken in the telegram of the 25th May, already referred to, as to the consequences to them and their works at Fort Frances and International Falls, if they opened the sluices and gates, and one can estimate how far their action (or inaction) throughout this whole trouble was influenced by their own personal interests.

Throughout the trial much importance was attached by the defendants to a comparison between what would have been the discharge capacity of the falls had the river and falls remained in a state of nature, and the actual capacity in 1916.

To complete the evidence offered by the defendants on this heading, the trial, after it had proceeded for some days, was adjourned for several weeks to procure, under commission, the evidence of one Fanning, a witness out of the jurisdiction, who took part in making surveys and measurements at International

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Falls, years before any of the defendants' works were constructed. Judging from reading the notes of his evidence, he proved to be a clever and astute witness, with an obviously strong bias in the defendants' favour, one who, the Commissioner found occasion to say, "had shewn himself amply qualified to take care of himself," careful in avoiding any statement which might be damaging to the defendants, and on his cross-examination ready, upon a hint or suggestion from counsel for the defendants, to take shelter behind a declaration of want of sufficient knowledge to answer the question, or that the question did not contain sufficient data to enable him to answer. Whatever value might otherwise be attached to his evidence was materially detracted from, if not altogether destroyed, by what occurred during his cross-examination when a practice was resorted to which, even if it be proper in other jurisdictions, would not be tolerated in our Courts. I refer to the repeated objections by counsel appearing for the defence, made when the cross-examination led into dangerous ground, and stated, in the presence of the witness, at such length and with such particularity as to be suggestive to an alert witness, as was this witness. One cannot read the statement of these objections and the answers which followed without feeling convinced that the witness appreciated the effect which was obviously intended to be produced, and responded accordingly.

Professor Meyers, called for the defence, in the course of his exhaustive evidence, made the statement that, in a state of nature, the lake would have gone to a stage of substantially 499.6 in 1916. (The maximum reached that year was 500.9.) He had not seen the location before the dam was constructed. His knowledge of the natural conditions was not first-hand, but rested partly on records and data some of them not proven with complete accuracy, such as that adduced from the composite map referred to in the evidence. Some of his statements were based upon theory or partly on deductions from such information as he had obtained outside of his own observations. No attempt was made to offer any reason for or explanation of how he arrived at this conclusion, nor was he examined upon this statement; but it was left for counsel, in argument, to essay an explanation by calculations of inflow and outflow under various conditions.

Without reflecting in the slightest on the honesty of Prof.

Meyers' evidence—for I believe he was both a capable and a straightforward witness—I must decline to accept the bald statement even of an expert, particularly if it rests on theory, without the assertion of such reasons as his observation or other means of personal knowledge enable him to give. I cannot take such evidence in preference to the vast amount of incontrovertible evidence both of witnesses as to actual happenings and of many undoubted circumstances as well, which lead to an inevitable conclusion to the contrary.

It is impossible to discuss fully the voluminous evidence submitted during the course of a trial extending over several days, or to refer even in a general way to many phases of the evidence which have determined me in the conclusions I have arrived at. I have not overlooked any aspect of it; and I have no hesitation in finding the facts to be as I have stated them. Indeed, the more I have studied the evidence, and with the impressions I formed at the trial, the more I feel that the situation would justify stronger and more emphatic language than I have used to describe the attitude of those operating the dam, in serving their own selfish interests in utter disregard to the rights of others. To them their own interests were paramount. Compliance with any order, request, or suggestion to ameliorate the conditions was either refused or was wrung from them with the greatest reluctance on their part. I say this with full realisation that conditions were unusual in 1916, and with the firm conviction that, so far as these plaintiffs were affected by what happened, there was much that could have been done, even under the conditions that prevailed, and which was not done, which would have afforded them some relief.

The most recent authority on the question of liability in such cases is found in the cases decided in the House of Lords while these actions have been pending, namely, *Greenock Corporation v. Caledonian R.W. Co.* and *Greenock Corporation v. Glasgow and South-Western R.W. Co.*, [1917] A.C. 556, the head-note of which lays it down that:—

“It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable.”

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In the reasons for judgment, many earlier authorities are collected and reviewed. I shall refer to one only, *Kerr v. Earl of Orkney* (1857), 20 D. 298, in which this statement appears (p. 302) :—

“Although we did not require any answer from the respondent upon the general point of Lord Orkney’s liability for the consequences of his dam bursting from a violent fall of rain, yet I think it right to state the general principle on which the view of the Court is founded. That principle is—that if a person chooses upon a stream to make a great operation for collecting and damming up the water for whatever purpose, he is bound, as the necessary condition of such an operation, to accomplish his object in such a way as to protect all persons lower down the stream from all danger: he must secure them against danger. It is not sufficient that he took all the pains which were thought at the time necessary and sufficient. They were exposed to no danger before the operation. He creates the danger, and he must secure them against danger, so as to make them as safe notwithstanding his dam as they were before. It is no defence in such a case to allege the dam would have stood against all ordinary rains—it gave way in an extraordinary and unprecedented fall of rain, which could not be expected. The dam must be made perfect against all extraordinary falls of rain—else the protection is not afforded against the operation which the party must accomplish. An extraordinary fall of rain is a matter which, in our climate, cannot be called a *damnum fatale*—supposing the doctrine so denoted by that term to be applicable, generally speaking, to a dam for collecting water. And the experience of the last fifteen years has shewn that the increased drainage of the country brings down in heavy rains the whole water in a very short space of time, and therefore in floods of a weight, and power, and force of water quite unknown in former times. But against such a state of things the party forming such dams must completely provide, so as to secure safety to those lower down the stream. When an operation is made which involves great risk to the safety of life and of property, the condition on which alone that can be allowed which causes such risk is complete protection.”

In *Tennent v. Earl of Glasgow* (1864), 2 M. (H.L.) 22, “*damnum fatale*” occurrences are defined as being those dependent on cir-

cumstances which no human foresight can provide against and of which human prudence is not bound to recognise the possibility, and which, when they do occur, are calamities which do not involve the obligation of paying for the consequences that may result from them.

In his reasons in the *Greenock* cases, already referred to, Lord Finlay, L.C., at p. 572, says: "It is true that the flood was of extraordinary violence, but floods of extraordinary violence must be anticipated as likely to take place from time to time. It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable." It may be very properly added that, even if the works substituted for the channel provided by nature are adequate to carry off the water, liability will likewise follow if there is failure to make use of the adequate substitute.

In the cases referred to, the damage was to persons below the dam; but persons up-stream from the structure, where conditions are affected by the dam, are surely entitled to like protection.

The events which happened when the plaintiffs suffered the damage were not attributable to the act of God so as to relieve those who controlled and operated the dam from liability. An accident is said to be the result of the act of God when it is due to natural causes directly and exclusively, without human intervention, and such that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected. The term "act of God" is strictly limited to those classes of inevitable accidents which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause: Clerk & Lindsell's Law of Torts, 6th ed., p. 489; *Nugent v. Smith* (1876), 1 C.P.D. 423, 444.

Three of the plaintiffs, Seth Smith, Gagne, and Foster, are not the owners of the lands on which they reside, and on which they have erected buildings and other structures. They have, however, been the occupants thereof for several years; these buildings and structures were erected at their own expense, and they made use of them and of the lands for their own purposes in conducting

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their business of fishermen, for which they have a license from Provincial authority.

It does not rest with the defendants to object to the actions on these grounds.

A possession which satisfies the conditions of being substantially exclusive, and of being enjoyed *animo possidendi*, confers during its continuance an interest in the subject-matter of possession as against all who cannot shew a title to it, and gives a right to retain the absolute and undisturbed enjoyment against all wrongdoers. He who has such possession may, just as may a lawful owner, use a reasonable degree of force in its defence: Clerk & Lindsell's Law of Torts, 6th ed., p. 351; *Green v. Goddard* (1704), 2 Salk. 641; *Weaver v. Bush* (1798), 8 T.R. 78. He may sue in trespass any one who disturbs his possession, and in such an action not only is it not incumbent upon the plaintiff to shew a title, but it is no answer for the defendant to say that the title and right to possession is in another person; *jus tertii* is no defence to the action unless the defendant can shew that the act complained of was done by the authority of the true owner: *Graham v. Peat* (1901), 1 East 244; *Chambers v. Donaldson* (1809), 11 East 65.

Any possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support an action of trespass against a wrongdoer: Halsbury's Laws of England, vol. 27, p. 854, para. 1501, and cases there cited. If the plaintiff is in possession, the defendant cannot set up the title of a third party unless he claim under such person: *ib.*, p. 859, para. 1511; *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405.

The suggestion that the rights conferred upon the defendant the Ontario and Minnesota Power Company Limited in its charter of incorporation entitled it to back up the water to the extent to which it was backed up in 1916, cannot be accepted. Equally untenable is the position that that company, by virtue of its charter and its contractual rights from the Government, has acquired some superior privilege justifying a disregard of those whose interests lie along the waters of the upper river or lake. A reference to the agreement of the 9th January, 1905, with Backus and his associates, will shew that the Provincial authorities were careful not to give authority for or sanction any such operation as would inflict damage upon or interfere with the rights of others.

So, too, the order in council (Dominion) obtained in September, 1908, for the purpose of approval of the proposed works at the falls, granted approval only subject to the conditions inserted in the agreement between the Government of the Province of Ontario and the applicants, and to other limitations and restrictions as well, including a reservation of power to the Minister of Public Works to regulate the retention and flow of water by or over the dam.

I have already referred to the failure or refusal to obey the directions of the Minister and his representatives as to the water-flow at the dam when conditions had become serious in 1916.

The reasons for judgment of a Divisional Court in *Isherwood v. Ontario and Minnesota Power Co.* (1911), 2 O.W.N. 651, 18 O.W.R. 459, are instructive as to the purposes of the Acts—Dominion and Provincial—by which powers were conferred upon that company in regard to the construction and maintenance of the dam, the limitation of these powers, and the liability which still rests upon the company.

In view of the liability which I feel rests on such of the defendants as control and operate the dam, it is unnecessary, for the purposes of these actions, to go into the consideration of the claim that the dam was constructed and is maintained without legal authority and in violation of the provisions of the Ashburton Treaty.

The defendant the Minnesota and Ontario Power Company, in its statement of defence, denies that it erected or caused to be erected or ever has maintained or controlled the dam, and in his evidence the president of that company stated that it has nothing to do with the dam—that the Rainy River Improvement Company owns the Minnesota side of it. This evidence seemed to come as a surprise to the plaintiffs' counsel, as there was an intimation that in other proceedings a different position had been taken.

Mr. Backus was one of the incorporators of the Rainy River Improvement Company, and at the time of the trial he was president of that company, as well as of the Minnesota and Ontario Power Company. The interests of the two companies to some extent run parallel.

In the absence of any other evidence in contradiction of Backus's statement, I cannot hold the Minnesota and Ontario

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Power Company liable, and these actions will be dismissed as against that company without costs.

The several plaintiffs are entitled to recover against the Ontario and Minnesota Power Company Limited, to the extent of their damage.

I have, since the trial, read and carefully analysed the evidence of damage in each case, and my assessment is based upon a moderate estimate of loss for which that company is liable.

In respect of some of the items of claim, the evidence is not of that definite character which one would desire. My conclusions, however, are based upon the most careful consideration that I have been able to give:—

The plaintiff Matthew H. Smith's damages I assess at.	\$1,900
those of the plaintiff Seth Smith at.....	1,450
those of the plaintiff Peter Foster at.....	900
those of the plaintiff Narcisse Gagne at.....	1,400
and those of the plaintiff John Tighe at.....	540

The plaintiffs are also entitled to their costs.

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[IN CHAMBERS.]

Feb. 25.

RE SHEPARD AND ROSEVEAR AND MOYES CHEMICAL CO. LIMITED.

RE MOYES CHEMICAL CO. LIMITED AND HALSTED.

Mortgage—Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, sec. 2 (1) (a)—Application of Act to Derivative Mortgage—Mortgages Act, R.S.O. 1914, ch. 112, sec. 2 (d)—Stay of Proceedings—Delay—Sufficiency of Security—Interest.

The Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, is a statute calling for a liberal interpretation; and the case of a derivative mortgage falls within its provisions without doing any violence to them.

Section 2 (1) (a) of the said Act and sec. 2 (d) of the Mortgages Act, R.S.O. 1914, ch. 112, considered.

In the circumstances of this case, proceedings upon a derivative mortgage were stayed, at the instance of the mortgagees, the makers of the derivative mortgage.

The intention of the Act is to permit delay; and delay should be granted so long as the ultimate recovery of the money is not jeopardised, and reasonable compensation by way of interest is paid.

MOTION by the Moyes Chemical Company Limited for an order for leave to commence proceedings against George Shepard and Charles L. Rosevear, the makers of a mortgage to the appli-

cants and the owners of the mortgaged land, if the Court should be of opinion that such proceedings should be allowed; and for an order staying the proceedings instituted by the executors of James Addison Halsted, deceased, under the Winding-up Act, against the applicants, and restraining the executors from commencing an action or other proceedings against the applicants upon their covenant to pay to the deceased Halsted the sum of \$4,000 secured by an assignment of the Shepard and Rosevear mortgage by the applicants to him.

The motion was made under sec. 2 of the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22. The section reads (in part) as follows:—

2.—(1) No person shall,—

(a) take or continue proceedings by way of foreclosure or sale or otherwise . . . for the recovery of principal money secured by any mortgage of land or any interest therein made or executed prior to the fourth day of August, 1914;

(d) take or continue any proceedings for the recovery of any part of the principal money secured by mortgage . . . payable by the . . . mortgagor upon any covenant . . . made or entered into prior to the fourth day of August, 1914, . . . ;

except by leave of a Judge granted upon application as herein-after provided.

February 15. The motion was heard by MIDDLETON, J., in Chambers.

H. J. Martin, for the applicants.

H. A. Newman, for Shepard and Rosevear.

F. J. Hughes, for the executors of Halsted.

February 25. MIDDLETON, J.:—The land in question is worth \$34,000; there is a first mortgage upon it for \$15,000; the applicants' mortgage is a second mortgage for \$4,900; and the derivative mortgage to Halsted is for \$4,000.

As between the mortgagors (Shepard and Rosevear) and the mortgagees (the applicants) there is no trouble. It has been

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arranged that the mortgage may stand at 7 per cent. interest. The mortgagors cannot pay by reason of war conditions, and there seems such a margin in the property that the delay cannot prejudice the mortgagees.

The mortgage has been assigned by way of derivative mortgage to Halsted to secure an advance of \$4,000, at the very high rate of interest of 10½ per cent., and the executors of Halsted now desire to proceed, not so much against the mortgagors, as against the original mortgagees, who thus find themselves between the upper and nether millstones—a mortgagor who cannot pay and a derivative mortgagee who will not wait.

The argument is that a derivative mortgage is a mortgage of personal property, and is not within the statute.

No doubt, a mortgage is personal property; it is a security for money and will so descend; but this does not appear to me to be the real question. What must be ascertained is the intention of the statute. It relates to "the recovery of money secured by mortgage" (sec. 2 (1) (a)), and prohibits action, in certain circumstances, to recover money "secured by any mortgage of land or any interest therein" (*ib.*)

A mortgagee has an "interest in land," and the loan upon the derivative mortgage is money secured by a mortgage of this interest, and so the statute prevents action to recover it—not only as against the land but by any collateral remedy.

The statute is one calling for a liberal interpretation; and the case of a derivative mortgage falls within its provisions without doing any violence to them.

If the Act is read *in pari materiâ* with the Mortgages Act, R.S.O. 1914, ch. 112, then the interpretation clauses cover the case*.

On the merits, the application should be granted and proceedings stayed—the interest of the original mortgagees is too great to be sacrificed, and their *bona fides* is manifest from the interest they are paying. No doubt, in many instances, as here, the mortgagee is inconvenienced by the delay; but the intention of the Act

* Section 2 of the Act, cl. (d), provides: "Mortgage" shall include any charge on any property for securing money or money's worth; "mortgage money" shall mean money or money's worth secured by a mortgage; "mortgagor" shall include any person deriving title under the original mortgagor or entitled to redeem a mortgage, according to his estate, interest or right in the mortgaged property; and "mortgagee" shall include any person deriving title under the original mortgagee.

is to permit delay; and, as I understand it, my duty is to see that the delay is granted so long as the ultimate recovery of the money is not jeopardised, and reasonable compensation by way of interest is paid.

As usual in these cases, the mortgagees (the applicants) should be allowed the costs, fixed in each case at \$20, to be paid in 10 days.

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[APPELLATE DIVISION.]

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Feb. 5.

REX V. HARVEY AND TAYLOR.

*Criminal Law—Conspiracy to Defraud—Evidence of Identity of one Prisoner—
Trial by Judge without Jury—Sufficiency of Evidence to Sustain Con-
viction.*

The defendants were tried by a County Court Judge without a jury upon a charge of conspiring to defraud the complainant. At the trial the complainant, in the witness-box, would not swear positively that the defendant H., then present in court as a prisoner in the dock, was the man or one of the men who had defrauded him, although he had identified the same man at the preliminary hearing in the police court. The complainant said: "To the best of my knowledge, he was the man. . . . There is another man here to-day, and I am undecided which it is." The County Court Judge thought the evidence of identity sufficient, and convicted the two defendants:—

Held, that the conviction could not be disturbed, there being some evidence to sustain it.

Per CLUTE and RIDDELL, JJ. (MULOCK, C.J. Ex., *contra*), that, if there had been a jury, the case could not have been withdrawn from them.

CASE stated by WINCHESTER, Judge of the County Court of the County of York, as follows:—

"The accused were charged before me at the County Judge's Criminal Court, in the city of Toronto, on the 19th day of December, 1917, on the following charge:—

"On the 10th day of November, 1917, Claude Harvey, *alias* J. W. Thornton, and Charles Taylor were committed for trial for that they, the said Claud Harvey, *alias* J. W. Thornton, and Charles Taylor, on the 27th day of September, 1917, in the said county, did unlawfully conspire and agree together by deceit and falsehood or other fraudulent means to defraud John E. Thompson out of the sum of twenty-one hundred and seventy dollars in money, contrary to the Criminal Code. And further that the said Claude Harvey, *alias* J. W. Thornton, at the time and place

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aforesaid, fraudulently and knowingly, by false pretences, obtained from John E. Thompson two thousand one hundred and seventy dollars in money with intent to defraud, contrary to the Criminal Code.

“And I found them both guilty on the said charges; and, at the request of counsel for the accused, reserved for the consideration of this honourable Court the following questions, and make the charge-sheet, the evidence taken at the trial, including the register of the Turkish Baths at Buffalo, and the objections of the counsel for the accused, part of the reserved case.

“1. Was there evidence, admissible and sufficient, against the accused, on which they could properly be convicted on the said charge?

“2. Should I have admitted as evidence the book purporting to be the register of the Turkish Baths of Buffalo, which was referred to in the evidence of one Sanson, and was produced by counsel for the defendants as the book which he undertook to produce, notwithstanding that the said counsel for the defendants subsequently objected to its admission?”

The evidence of the identity of Harvey was that of the complainant, as follows:—

Mr. Thurston (for the Crown): Q. Did you ever meet the prisoner Harvey before? A. I am going to say something.

The Court: Answer the question put to you? Q. I am not sure.

Mr. Thurston: Q. You are not sure? A. No.

Q. That is not what you swore to in the police court? A. I know it is not. To the best of my knowledge, he was the man.

Q. You swore in the police court he was the man? A. There is another man here to-day, and I am undecided which it is. That is a peculiar thing, is it not?

Q. It is rather a peculiar thing? A. I don't want to make any mistake.

The Court: You have made a mistake, apparently, if you are not right now, because you swore to something before. Was it right or wrong when you swore to it? A. It was right when I swore to it.

Q. Where is the other man now? A. Right there (pointing).

Q. This one? A. Yes.

Q. This man knows the prisoner—

Mr. Horkins (for the defendants): He is the brother of the prisoner.

Witness: Can I go and look at them?

The Court: Yes.

The complainant left the box and examined the features of the men to whom reference was made. Witness then resumed the stand.

Mr. Thurston: Q. What are you going around asking these people questions for? A. I want to be certain.

Q. Are you certain now? A. No, I am not certain.

Mr. Thurston: I will put this man in the box, your Honour, and ask him a question or two.

Complainant stood aside.

Harry L. Hankenson, sworn, examined by Mr. Thurston:—

Q. What is your name? A. Harry Louis Hankenson.

Q. Where do you live? A. Chicago.

Q. Where were you on the 27th of September, 1917? A. In Chicago.

Q. You were not in the city of Toronto? A. No, sir.

Witness withdrew.

John Edward Thompson, complainant, resumed the stand.

Mr. Thurston: Q. Are you satisfied now that this man is the man? A. No, I am not. I don't want to make any mistake.

On cross-examination:—

Q. Look here, where are Thornton and Reid? Those are the fellows you should have here? A. I am not certain which of these men it is; it might be a brother.

Q. Would you swear it was the brother? You would not, because that would put you in a nice hole? A. I understand that.

Q. Did you see Harvey at all? A. Harvey was the man I was sure was Thornton.

Q. You are not sure now? A. No.

Q. And you are not identifying Harvey at all, positively, as being one of the men there? A. I don't want to make a mistake about the man.

Q. And, therefore, what you have sworn to before you will not swear to—is that right? A. Yes.

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February 5. The case stated was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

W. Horkins, for the defendants, argued that there was no evidence of the identity of Harvey: and, Harvey being acquitted, the charge of conspiracy against Taylor must also fail.

J. R. Cartwright, K.C., for the Crown. The evidence against Harvey, though slight as to identity, is sufficient to justify a conviction.

MULOCK, C.J.Ex. (at the conclusion of the argument):—Were this a case tried before me with a jury, I think I should not have allowed the case against Harvey to go to the jury. But it comes before us in a different form: the evidence has been passed on by the trial tribunal, and a verdict found against Harvey. I cannot say that there is no evidence, and must affirm the conviction.

Harvey being convicted, there is ample evidence against Taylor.

CLUTE, J.:—I should have allowed the case against Harvey to go to a jury; and see no reason for interfering with the verdict.

RIDDELL, J.:—The complainant swore in the Police Court to the identity of Harvey; at the trial, by reason of the appearance of a brother of the prisoner (or some other person) very like the prisoner, his confidence is shaken, and he is “not certain which of these men it is.” The other man is proved not to have been in Toronto on the day in question; and the complainant, cautious as he is, swears “to the best of my knowledge he is the man.”

If Crown counsel insisted on this evidence being submitted to a jury, I do not think the case could have been withdrawn from them.

SUTHERLAND and KELLY, JJ., concurred.

THE COURT answered the first question in the affirmative. The second question was admittedly immaterial, and was not answered.

Conviction affirmed.

[MIDDLETON, J.]

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Feb. 27.

RE ASPEL.

Will—Construction—Charitable Gifts—Inaccurate Description of Objects—Ascertainment by Evidence—Undisposed of Residue—Claim of Executors to Beneficial Enjoyment—Trustee Act, R.S.O. 1914, ch. 121, sec. 58—Indication to Contrary in Will—Provision for Remuneration of Executors—Claim of Charities to Residue—General Gift for Charitable Purposes—Testator Leaving no Next of Kin—Executors Holding in Trust for Crown—Inquiry for Claimants—Bounty of Crown.

By his will the testator gave the whole of his property to two persons as trustees and executors "for the purposes after-named." The whole estate was of the value of about \$12,000. He then gave seven specific legacies, amounting in aggregate value to \$9,300, to different charitable institutions. He made no disposition of the residue. He appointed the executors "for the consideration of 8 per cent. of the whole estate as set forth in this my will."

The description in the will of the institutions to be benefited was inaccurate, and there was some uncertainty as to what institutions were intended. Upon evidence submitted, an order was made determining the objects of the testator's bounty.

The clause above quoted was construed as giving the executors a commission of 8 per cent. on the whole estate as remuneration for their care, pains, and trouble.

The testator, so far as known, was the last of his family; he was unmarried, and had no relations:—

Held, that the provision made for the executors indicated that the testator did not intend them to take the residue beneficially; and, by virtue of sec. 58 of the Trustee Act, R.S.O. 1914, ch. 121, they held the residue in trust for the next of kin, who would take upon an intestacy, if there were next of kin; and, there being no next of kin, the executors held for the Crown.

Middleton v. Spicer (1783), 1 Bro. C.C. 201, followed.

Held, also, that the gifts of named amounts to named charities could not be construed as carrying with them a gift of the residue or surplus for distribution among the named charities; nor could a general gift for charitable purposes be implied.

Held, also, that there should not be a reference for the purpose of an inquiry as to claimants; any meritorious claim would, no doubt, be recognised by the Crown.

MOTION by the executors of the will of William Aspel for an order determining questions arising as to the meaning and construction of the will, which was as follows:—

"This is the last will and testament of me William Aspel Gentleman presently residing at number 26 Sherman Avenue South in the City of Hamilton County of Wentworth and Province of Ontario. I hereby revoke all former wills at any time made by me and being desirous of settling my affairs in the event of my decease and having confidence in the persons afternamed as Executors and Trustees Do hereby give grant assign dispose confer and make over to and in favour of Robert Graham, Carpenter,

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number 33 Baillie Street and James Charters, Letter Carrier, number 308 Caroline Street South both of the City of Hamilton as Trustees and Executors and the survivor of them as Trustee and In Trust for the purposes afternamed the whole heritable and movable estate real and personal presently belonging to me and shall belong to me at the time of my decease together with writs and vouchers thereof and I nominate and appoint Robert Graham and James Charters and the survivor of them to be my Executors and Trustees of this my will for the consideration of Eight per cent. (8 per cent.) of the whole estate as set forth in this my will. But declaring that these presents are granted in trust for the purposes afternamed viz.: First I direct my Trustees and Executors to first pay my just debts funeral and testamentary expenses; Second I give to the following organizations:—

“1000.00 Dollars to the Old Man’s Homes John Street North (one thousand).

“1000.00 Dollars to the Old Woman’s Home North John Street (one thousand).

“1000.00 Dollars to the Sanatorium (one thousand).

“1000.00 Dollars to the Salvation Army this City (one thousand).

“5000.00 Dollars to the Niagara Diocese of the Church of England (five thousand).

“200.00 Dollars to the Hamilton District Orange Hall (two hundred).

“The Thirteenth Royal Regiment Veteran Society Fenian Raid 1866 one hundred dollars (\$100.00) and I reserve my liferent and full power to alter innovate or revoke these presents in whole or in part and dispense with delivery hereof and I consent to the registration hereof for preservation.

“In witness whereof I have subscribed these presents written by myself at number 26 Sherman Avenue South this seventh day of February nineteen hundred and fifteen (1915).”

February 14. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

W. T. Evans, for the executors.

G. H. Sedgewick, for the Corporation of the City of Hamilton.

E. F. Lazier, for the Hamilton Health Association.

W. S. MacBrayne, for the Synod of the Diocese of Niagara.

S. H. Slater (by order appointing him), for the unknown heirs or next of kin of the testator.

A. H. Gibson, for the Aged Women's Home and Hamilton Veteran Association.

J. M. Godfrey, for the Muskoka Sanatorium.

J. R. Cartwright, K.C., for the Crown.

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February 27. MIDDLETON, J.:—This is a motion for the determination of certain questions as to the meaning of the will of William Aspel, who died on the 31st July, 1917.

The will was prepared by the testator himself, upon a Bax will form.

The testator makes seven pecuniary legacies, amounting in all to \$9,300, and his estate amounts to almost \$12,000.

Certain questions are asked as to the particular legatees, but the main question is as to the fate of the \$2,700, being the excess of the estate over the amount specifically dealt with.

Dealing with the minor questions first: \$1,000 is given "To the Old Man's Homes John Street North," and \$1,000 "to the Old Woman's Home North John Street."

The House of Refuge in the city of Hamilton is situate on John Street north. The building is at the corner of John and Burlington streets, and the front is on Burlington street, but the main street leading to it is John street. It is a municipal institution, owned and maintained by the city. It is commonly called "The Old Men's Home," and "The Old Women's Home."

There is in Hamilton another institution, on Wellington street, "The Hamilton Orphan Asylum," which now devotes itself to the care of old ladies, and is called "The Aged Woman's Home," but this is not its real name. I have no doubt that what the testator intended to benefit was the municipal institution on John street. He may or may not have known how it was maintained. He may or may not have desired "to keep the tax rate down," but the language used points to this institution, and not to the other.

The next bequest is \$1,000 to "the Sanatorium." This, no doubt, means "the Sanatorium" on the mountain, maintained by the Hamilton Health Association. This is the name by which it

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is commonly designated, and there is nothing to suggest that the testator meant the Gravenhurst institution sometimes so called.

Next there is the gift of "\$1,000 to the Salvation Army this city." The Salvation Army has branches in Hamilton, and it will take this legacy for use in connection with its work carried on in Hamilton.

"\$5,000 to the Niagara Diocese of the Church of England." This means the "Synod of the Diocese of Niagara." Ontario statutes 39 Vict. ch. 107 and 61 Vict. ch. 72.

The \$100 given "to the Thirteenth Royal Regiment Veteran Society Fenian Raid 1866" goes to "The Hamilton Veteran Association of 1866."

The executors are appointed "for the consideration of eight per cent. (8 per cent.) of the whole estate as set forth in this my will." This, I think, gives the executors 8 per cent. on the whole estate as remuneration for their care, pains, and trouble.

As to the residue—so far as known, Aspel was the last of his family. He was unmarried, and had, as he said, no relations.

The Crown claims an escheat. The executors contend that they take beneficially. Mr. MacBrayne contends that the fund must be divided among the named charities *pro ratâ*, or that there is such a general charitable intent that there ought to be a reference to have a scheme devised for distribution among charities. And Mr. Slater asks that there be a reference to a Master to inquire by advertisement and otherwise for claimants.

Dealing first with the executors' claim. At one time, under certain circumstances, an undisposed of residue went to the executors beneficially. The theory was that the testator gave them his estate and then directed certain payments, and his presumed intention must have been to allow them to keep all that he had not directed them to pay away.

By statute, now found as sec. 58 of the Trustee Act (R.S.O. 1914, ch. 121), this is changed; and, unless the testator has indicated by his will that the executor is intended to take beneficially, he holds as trustee for the persons who take on an intestacy under the Devolution of Estates Act. Sub-section (2) directs that, where there is no person who will take upon an intestacy under that Act, the rights of the executor shall remain unchanged. Thus this case falls to be determined on the old law. The rule is, as already

said, based upon the presumed intention of the testator; and so, if on the will the Court can find any indication of a contrary intention, the executors will not be permitted to hold beneficially, and, in the absence of next of kin, will hold for the Crown. One thing always taken as indicating that the executors are not intended to take the residue beneficially is a provision for them in the will. Here they get 8 per cent., and this is all.

In *Middleton v. Spicer* (1783), 1 Bro.C.C. 201, Lord Chancellor Thurlow said (p. 205): "It would be mere pedantry to run over all the cases to be met with on this subject. . . . Here the executors, having legacies bequeathed, and being clearly trustees, cannot by any possibility take any beneficial interest. . . . The executors being excluded, and no relations to be found, I consider the executors as much trustees for the Crown, as they would have been for any of the next of kin, if these could have been discovered." Many other similar cases there are—none in conflict. I shall not review them, for what would have been "mere pedantry" in 1783 would be much worse now.

Then as to the claims of the charities. There is no gift of anything more than the named amount to any. The fact that in the event of a deficiency the legacies must abate, because there is not enough to answer the testator's bounty, does not augment the gift if there is a surplus, for there is no gift of it.

Then the claim that there is a general gift for charitable purposes fails for the same reason—the absence of the gift. When land is given for a charitable trust, and a sum derived from the income is directed to be used for named charitable purposes, and there is a surplus, it has been held that the original gift of the land defeats the heir, and that he does not take the unused income as upon an intestacy. The charitable trust affects the entire income. This doctrine is one that it is said is to be confined strictly to the cases decided, and should not be carried further. *Attorney-General v. Mayor of Bristol* (1820), 2 J. & W. 307, is the leading case. When the doctrine originated, the law as to resulting trusts was not well understood. Now there is the resulting trust for the next of kin or Crown as the case may be.

I do not think there should be a reference; the residuary estate must bear the costs of administration, of this motion, and the executors' commission; and, if the costs of a reference should be

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added, it would be depleted to the vanishing point. The Crown is always ready to deal with any meritorious claim.

Costs of all parties may be paid out of the estate.

It is with some satisfaction that I find I can make this order, for it does not defeat any expressed wish of the testator.

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[APPELLATE DIVISION.]

March 1.

BARCHARD & CO. LIMITED v. NIPISSING COCA COLA BOTTLE
WORKS LIMITED.

Chattel Mortgage—Action by Division Court Judgment Creditors of Mortgagor to Set aside—Mortgage Void under Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135—Division Court Judgment Satisfied after Commencement of Action—Trial of Action to Determine Question of Costs—Failure to Issue Execution upon Division Court Judgment before Action—Costs of Action and of Appeal—Procedure—Class Action—Style of Cause—Amendment—Action Brought on Behalf of all Creditors—Locus Standi of Plaintiffs—Sec. 2 (b) of Act—Existence of other Creditors.

The plaintiffs, being judgment creditors of the defendant company by virtue of a judgment recovered in a Division Court, brought this action, in the Supreme Court of Ontario, to have it declared that a certain chattel mortgage made by the defendant company to the defendant T. was void as against the plaintiffs and other creditors of the defendant company. When the action was commenced, execution had not been issued upon the plaintiffs' judgment. Before this action came down to trial, the amount of the plaintiffs' judgment had been paid to them; and, so far as they were concerned, only the costs of this action were in question. The trial Judge (LATCHFORD, J.) determined that the chattel mortgage was void against creditors of the mortgagor, and ordered the defendants to pay the plaintiffs' costs of the action. The defendants appealed from this judgment:—

Held, that the chattel mortgage was rightly found to be void under the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135—the transaction between the defendants was in fact an endorsement by the defendant T. of the defendant company's promissory note, whereas the chattel mortgage was in the form prescribed for a direct loan.

Held, also, that the trial Judge's award of costs to the plaintiffs could not be interfered with, but that the plaintiffs should have no costs of the appeal.

Per MEREDITH, C.J.C.P.:—After this action was brought, the plaintiffs' claim was not for the amount owing upon their judgment only, but for the costs of this action also. The costs did not become a debt until adjudged to the plaintiffs; but, when adjudged, an invalid mortgage should not be allowed to stand in the way of enforcing payment of them.

The plaintiffs should have issued execution in the Division Court, caused the mortgaged goods to be seized under their execution, and, if a claim had been then made by the mortgagee, litigated that claim in the Division Court in interpleader proceedings. Having taken a more expensive course, they should be deprived of the costs of the appeal.

Per RIDDELL and ROSE, JJ.:—Although it was not shewn by the style of cause, as it should have been, it sufficiently appeared from the statement of claim, that this action was brought on behalf of all creditors, and an amendment of the style of cause was properly allowed at the trial.

The defect in the chattel mortgage was one of which advantage could be taken by creditors. If the plaintiffs had not sued on behalf of all creditors, not being execution creditors when they commenced this action, they would have had no *locus standi*; but, suing as they did on behalf of all creditors, their status was expressly established by sec. 2 (b) of the Bills of Sale and Chattel Mortgage Act. And they had proved that there were other creditors.

AN appeal by the defendants from the judgment of LATCHFORD, J., at the trial, in favour of the plaintiffs, who were judgment creditors of the defendant company, in an action to set aside a chattel mortgage made by the defendant company to the defendant Taylor. By the judgment the chattel mortgage was declared void as against the plaintiffs and all other creditors of the company, and the defendants were ordered to pay the costs of the action.

May 8, 1917. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

Gideon Grant, for the appellants, argued that the chattel mortgage was valid, and so the defendants should not have to pay the costs of this action. At all events, the judgment appealed against was wrong, because the plaintiffs' debt had been paid, and it was not proved that there were any creditors at the time of the trial. If the plaintiffs had proceeded to execution on their Division Court judgments in the first instance, they would have been paid, and there would have been no necessity for bringing this action.

W. S. Brewster, K.C., for the plaintiffs, respondents, contended that the plaintiffs were within their rights in bringing this action; that the evidence supported the finding of the learned trial Judge as to the invalidity of the chattel mortgage; and that after this action was brought there arose the debt for costs of this action, which was not satisfied by the payment of the Division Court judgments; and the plaintiffs were entitled to these costs as adjudged.

Grant, in reply.

March 1, 1918. MEREDITH, C.J.C.P.:—This case affords a very palpable instance of avoidable, indeed entirely unnecessary, litigation.

The plaintiffs recovered two judgments, for \$100 each, against the defendant company, in a Division Court; but, instead of proceeding, in the ordinary manner, to enforce these judgments in that

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Court, and without as much as issuing execution there, began this action in the High Court Division of this Court, against their judgment debtors and the defendant Taylor, to set aside a chattel mortgage made by the judgment debtors to Taylor, to set it aside so that the plaintiffs might make the amounts of their judgments out of the mortgaged goods of the judgment debtors—the defendant company.

Such a course was altogether unusual and unnecessary. The usual and the proper course in such a case is to seize the mortgaged goods under execution in the Division Court, and, in case of a claim being made to them by the mortgagee, to litigate that claim speedily and inexpensively, in the Division Court, by way of interpleader proceedings.

It may be that the plaintiffs were within their strict rights in beginning another action for the purpose of determining whether the mortgage was invalid against creditors of the mortgagors under the Statute of Elizabeth or under the Bills of Sale and Chattel Mortgage Act; but, however that may be, if such a case were tried before me, and if it were successful, no costs would be awarded to the plaintiff beyond what his costs would have been if the simpler and speedier way of determining the question had been taken: see *Goldsmith v. Russell* (1855), 5 DeG. M. & G. 547; and *Reese River Silver Mining Co v. Atwell* (1869), L.R. 7 Eq. 347, at pp. 350 and 352.

However, this action was brought, and, some time after that, the judgment debtors paid to the plaintiffs, and they accepted payment of, the amount of each of the Division Court judgments at different times: and steps were thereupon taken to have the question of the costs of this action disposed of at Chambers; but, as the parties were not able to agree upon the facts, the Master in Chambers referred the matter to the trial Judge, and the action was brought on for trial in the usual way.

The defendants' contention then, and throughout, was: that the chattel mortgage was valid, and therefore they should not pay any of the costs of this action: which they have persistently throughout refused to do, relying upon the validity of the impeached transaction entirely.

The plaintiffs' contention throughout was: that the mortgage was invalid against creditors, and therefore they should have all

their costs of this action. Nothing seems to have been said, on either side, of the unreasonableness of bringing this action when quite as ample relief could have been had in the Division Court in the way I have mentioned.

The trial Judge, finding the parties at issue, on the question of costs and the means of recovering such costs only, in the way I have mentioned, seemed to think that there was no course open to him but to try the action, and the trial was had accordingly.

The plaintiffs' case under the Bills of Sale and Chattel Mortgage Act having been proved by the plaintiffs from the depositions of the defendant the mortgagee, evidence for the defence was gone into, at considerable length; at the conclusion of which the learned trial Judge found and adjudged that the chattel mortgage in question was void, under the provisions of that Act, against creditors of the mortgagor, and awarded to the plaintiffs their costs of the action.

The defendants now appeal against that judgment, contending mainly that the learned Judge was wrong in considering that the chattel mortgage was void, as he did; and that in any case there should not have been any judgment of that character because the plaintiffs' debt was paid and it was not proved that there were any creditors of the mortgagors at the time of the trial; and so more than a mere question of costs is now involved in this appeal.

Upon the first point: the evidence supports the finding of the trial Judge; the mortgagee took the wrong kind of a mortgage, and he must now take the consequences which the Act attaches.

Upon the second point: the case is not as Mr. Grant would have us think it is: after this action was brought, the plaintiffs' claim was not for the amounts owed to them upon the Division Court judgments only, it was for the costs of this action also, and the payments which were made were but part payments of a greater claim. It is true that the costs did not become a debt until adjudged to the plaintiffs; but, when adjudged, why should an invalid mortgage stand in the way of enforcing payment of them? It could hardly be in the interests of any of the parties to go through the form of another trial to reach a conclusion already reached between the same parties. If the mortgage was invalid against creditors when the action was tried, it is still equally invalid, and should not be permitted to stand in the way of enforcement of the balance

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of the plaintiffs' claim in this action, now in the form of a judgment of this Court.

So, in my opinion, this appeal should be dismissed, but I would dismiss it without costs, not because of any merits of the appellants, who have been unduly litigious, but because of the demerits of the respondents in taking wholly unnecessary, unusual, and costly steps to enforce rights which could better have been enforced in the usual speedy and inexpensive way.

RIDDELL, J.:—This is an appeal from the judgment at the trial before my brother Latchford, in favour of the plaintiffs.

The statement of claim alleges indebtedness by judgment of the Nipissing company to the plaintiffs and to the Stamford company, the insolvency of the Nipissing company, and the making of a chattel mortgage by that company to their co-defendant Taylor "with intent to defeat, hinder, delay, or prejudice the plaintiffs and other creditors of the defendant company . . . and to give Taylor a preference over the other creditors of the defendant company." The prayer is "to have it declared that the said chattel mortgage is void as against the plaintiffs and other creditors of the defendant company."

It sufficiently appears from the statement of claim that the action is on behalf of all creditors, and not of the plaintiffs alone—we are informed by counsel for the plaintiffs that the writ of summons is so endorsed—Rule 5 (1)—but the writ is not before us.

Regularly the style of cause should shew that the action is a class action: *In re Tottenham*, [1896] 1 Ch. 628; *Township of Barton v. City of Hamilton* (1909), 13 O.W.R. 1118, at p. 1128. But that is a mere petty technicality, and in all proceedings the style of cause would be amended as a matter of course—much learning has been expended on the question of the necessity: *Cooper v. Blissett* (1876), 1 Ch. D. 691; *Worraker v. Pryer* (1876), 2 Ch. D. 109; *In re Royle* (1877), 5 Ch. D. 540; *Eyre v. Cox* (1876), 24 W.R. 317; *McNab v. Macdonnell* (1892), 15 P.R. 14; *In re Blount* (1879), 27 W.R. 865.

My learned brother Latchford was wholly right in allowing the formal amendment to be made at the trial—I do not see that the amendment has been made—so that the proper style might appear in the judgment: *In re Blount*, 27 W.R. 865; but that may now be done if the judgment is in other respects right.

The judgment declares the chattel mortgage void as against the plaintiffs and all other creditors of the defendant company and orders the defendants to pay the costs.

The facts are: the plaintiffs, having a claim on two notes for \$100 each, in October, 1915 (or perhaps the 8th January, 1916), recovered judgment for \$100.82 and \$4.68 costs—then they brought this action on the 24th January, 1916—the pleadings were closed in February, 1916—the plaintiffs issued execution on their judgment in March, and the amount was levied on the 22nd March, 1916—the other note was sued on and judgment obtained on the 29th March for \$100.50 and \$44.23 costs—this was paid under execution in June, 1916.

It is made a matter of complaint by the defendant company that the plaintiffs could have had their money at once had they issued execution, and that they should have issued execution and obtained their money. This is quite a novel complaint—often debtors have complained of the unnecessary and hurried issue of execution, but not before, in my experience, of the delay in enforcing judgment by execution. It is of course the duty of the debtor to seek out his creditor and pay him, not to wait until he is compelled to pay by the sheriff.

The plaintiffs, on being paid, brought the case before the Master in Chambers to have the costs disposed of—the defendants refused to admit the invalidity of the mortgage, and there had to be a trial.

Before my brother Latchford, counsel for the plaintiffs said that all that was in the case was a question of costs; counsel for the defendants at first demurred; but, on the learned trial Judge saying, "There is nothing for me to try out, except how much the plaintiffs should pay to the defendants for costs," counsel said, "I will take it that way, your Lordship."

Then the trial Judge asked, "What would be a fair sum for costs?" and counsel for the defendants said: "I will not consent to pay one cent of costs. . . . I am here ready to support the mortgage. I have my witnesses here"—and he insisted on going on with the evidence.

It was proved that the plaintiffs' debt was in existence at the time the chattel mortgage was executed, but had not been sued—that one judgment had been obtained but execution not issued at

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the teste of the writ—that the Stamford judgment had been obtained in 1915, but settled by payment—it was not proved to have been in existence when the writ was issued.

As to the chattel mortgage, I can find no evidence of fraud or intention to prefer—nor does Mr. Brewster allege anything of the kind. What is said is that the transaction was in fact an endorsement by Taylor of the company's note, whereas the chattel mortgage is in the form prescribed for a direct loan.

Notwithstanding the evidence of Taylor at the trial, and that of the bank manager, there is, in my opinion, sufficient to justify the learned trial Judge in finding that the transaction was, as represented by the plaintiffs, an endorsement.

There can be no doubt that a defect such as this in a chattel mortgage may be taken advantage of by creditors: *Meriden Britannia Co. v. Braden* (1894), 21 A.R. 352; *Parkes v. St. George* (1884), 10 A.R. 496.

But, if the plaintiff does not sue on behalf of all creditors, he cannot succeed unless at the date of the writ he was an execution creditor: *Parkes v. St. George*, 10 A.R. 496; *Hyman v. Cuthbertson* (1886), 10 O.R. 443; *Heaton v. Flood* (1897), 29 O.R. 87; *Clarkson v. McMaster* (1895), 25 S.C.R. 96.

The plaintiffs then had no *locus standi* unless the fact that they sue on behalf of other creditors gives it to them. That is expressly provided for by the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, sec. 2 (b).

It is unnecessary to consider whether it was incumbent upon the plaintiffs to prove that there were other creditors: they have proved that fact.

I would dismiss the appeal, but it is not a case for costs.

LENNOX, J., agreed in the result.

ROSE, J., agreed with RIDDELL, J.

Appeal dismissed without costs.

[APPELLATE DIVISION.]

* REX v. BAINBRIDGE.

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March 1.

Criminal Law—Seditious Libel—Pleading—Indictment—Plea of "Not Guilty"—Subsequent Amendment—Demurrer—Motion to Quash—Grand Jury—Particulars—Seven Distinct Publications Included in one Count—Verdict of "Guilty" in Respect of two Publications—Criminal Code, secs. 132, 133, 134, 852, 853, 855, 859, 860, 861—Discharge of Prisoner—Right of Crown to Prefer New Indictment.

Section 852 of the Criminal Code provides that every count of an indictment shall contain, and shall be sufficient if it contains, a statement that the accused has committed some indictable offence therein specified; but this does not mean merely naming an offence as "murder" or "theft"—the offence itself must be described with reasonable certainty. So also sec. 861, which declares that no count for publishing a seditious libel shall be deemed insufficient on the ground that it does not set out the words thereof, dispenses only with the *ipsissima verba*—there must be substantial references to identify the words or locate the objectionable parts.

An indictment for publishing a seditious libel, "to wit the matters contained in the annexed particulars," these particulars setting out seven different pamphlets published by the defendant, is an indictment for seven offences under one count.

The defendant was charged with publishing a seditious libel. The indictment as presented by the grand jury was that he did in a certain year and at a certain place "publish a seditious libel contrary to the Criminal Code section 184." On the 9th November, 1917, the defendant pleaded "not guilty" to the indictment without making any objection. On the 22nd November, 1917, the case came on for trial, when the defendant sought to demur to the indictment or to move to quash it, for defects apparent on the face. The trial Judge refused leave to raise the question, as the defendant had already pleaded. Particulars had been (without previous demand) delivered by the Crown on the 20th November, stating that the defendant did "publish seditious libel by publishing the following pamphlets." Then followed paras. 1 to 7, mentioning respectively seven pamphlets, each bearing a different title to the others, except that the seventh was not stated to have any title, and the seditious character and the purpose of publishing each was stated separately in its own paragraph, but no reference was made to any particular part or passage of any of them. The publications mentioned had been before the grand jury when they found the indictment. In view of these facts and of secs. 859 and 860 of the Code, as to the delivery of particulars, the trial Judge amended the indictment by changing the figures "184" into "134"—sec. 134 of the Code being obviously intended—and by adding the words "to wit the matters contained in the annexed particulars." The indictment was not sent back to the grand jury, nor was the defendant called upon to plead again. The trial then proceeded, and the petit jury found the defendant guilty on the amended indictment with regard to two of the publications mentioned in the particulars:—

Held, upon a case stated, that the demurrer to the indictment and the motion to quash should have been allowed; that the verdict did not make the indictment good; that the amendments should not have been made without the privy and consent of the grand jury; that the accused had been tried upon seven libels and convicted upon two, when the grand jury had found a bill upon only one, which was not known to be either of the two; and that the accused was, therefore, entitled to be discharged notwithstanding the verdict of the jury.

Sections 132, 133, 134, 852, 853, 855, 859, 860, and 861 of the Code considered. *Per CLUTE, J.*:—A new trial could not be granted, there being no indictment upon which the defendant could be tried; but the Crown was not precluded from preferring a new indictment.

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MOTION on behalf of the prisoner in arrest of judgment and for a reserved case.

November 22, 1917. The motion was heard by HODGINS, J.A., the trial Judge, at the Toronto assizes.

R. T. Harding, for the prisoner.

Peter White, K.C., for the Crown.

November 28. HODGINS, J.A.:—The accused was convicted before me on the 22nd November, 1917, by a jury, upon an indictment for seditious libel.

As amended by me, at the beginning of the trial, the indictment read:—

“The jurors for our Lord the King present: that Isaac Bainbridge in the year of our Lord one thousand nine hundred and seventeen at the city of Toronto in the county of York did publish a seditious libel contrary to the Criminal Code section 134 to wit the matters contained in the annexed particulars.”

The particulars mentioned seven publications. The jury found the accused guilty on the above indictment with regard to two of these publications. On the 9th November, 1917, when the accused pleaded “not guilty” to the indictment, it did not contain the words “to wit the matters contained in the annexed particulars,” as these particulars were not delivered until the 20th November, 1917.

Objection having been taken to the indictment by way of motion to quash, on the ground that it was too wide and not specific enough and that it was not stated against whom the libel was directed, the amendment above-mentioned was made, and the trial proceeded.

After the jury's verdict was brought in, Mr. Harding moved in arrest of judgment and for a reserved case, on the following grounds:—

(1) That the indictment as found by the grand jury does not state an indictable offence as required by the Criminal Code.

(2) That the indictment before amendment does not state the details and circumstances required by sec. 853, and the amendments made by his Lordship were not matters of form but matters of substance, and not amendable under the Code.

(3) That the indictment as found cannot be enlarged by "particular."

(4) That the indictment, as amended by his Lordship Mr. Justice Hodgins during the progress of the trial, charges seven offences under one count, contrary to sec. 853, sub-sec. 3, of the Criminal Code.*

(5) That the indictment as amended and the verdict of the jury, taken together, have found the defendant guilty of publishing three seditious libels under one count in the indictment, contrary to the Criminal Code.

The most serious objection is that of duplicity, and it was urged that that was not cured by the verdict.

I cannot find much authority upon the exact point. Intent is essential in seditious libel, and the charge was that of publishing a seditious libel. The jury have found that two publications were seditious, which involves the finding that the accused was guilty of a libel expressive of a seditious intention. Whether or not one of the two would in itself justify that finding is not for me to say. It is a question of fact for the jury, and they may have deduced the seditious intent from both together.

Similar objection was made in *Rex v. Benfield* (1760), 2 Burr. 980, where one count contained two distinct libels upon two distinct persons. The conviction was upheld upon the ground that the gist of the charge was *singing* these songs, and the Court looked upon it as one offence.

In *Regina v. Bleasdale* (1848), 2 C. & K. 765, and *Nash v. The Queen* (1864), 4 B. & S. 935, the intent to defraud was held to be the offence, although two instances of it were included in one count.

The indictment follows sec. 852, sub-sec. 3,† and sufficiently describes the offence—see secs. 855 and 861. The effect of the amendment was merely to put the record in form for the purposes of the trial, and the amendment was probably unnecessary in view of sec. 860.

In the recent case of *Rex v. Thompson*, [1914] 2 K.B. 99, the

* 853. . . . 3. Every count shall in general apply only to a single transaction.

†852. . . . 3. Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, or in any words sufficient to give the accused notice of the offence with which he is charged.

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Court of Criminal Appeal lays down the rule, notwithstanding many old cases, that several offences should not be charged in the same count. If the offence in this case was one which depended merely on the doing of an act, and did not lie in the intent with which it was committed, I should be bound to follow it upon that point. For the reason I have given, I think there is an essential difference between the two cases. It is doubtful whether this objection is open to the accused after verdict, and in the *Thompson* case no decision is given on this point, which is left open.

At the present trial the publications were produced and proved, and the accused gave evidence regarding each one, the result being that only two reached the jury, and as to those two the accused was found guilty.

No prejudice was suffered by the accused, and no substantial wrong or miscarriage, in my judgment, was occasioned by anything that forms the subject of this or any other objection.

This charge and conviction may properly be treated as for a single offence, i.e., publishing a seditious libel made up of two separate printed papers, but united in so far as the intent was concerned: *Rex v. Yee Mock* (1913), 21 Can. Crim. Cas. 400, 13 D.L.R. 220.

In view of the fact that in *Regina v. Hazen* (1893), 20 A.R. 633, *Rex v. Michaud* (1909), 17 Can. Crim. Cas. 86, *Kelly v. The King* (1916), 54 S.C.R. 220, 34 D.L.R. 311, and *Rex v. Thompson (supra)*, sec. 1019,* or its English counterpart, has been held effective where no substantial wrong or miscarriage has been occasioned, no good purpose would be served by reserving a case; and I must therefore refuse it.

The prisoner moved for leave to appeal from the conviction and for a direction to the trial Judge to state a case.

December 4. The motion was heard by MEREDITH, C.J.C.P., RIDDELL, SUTHERLAND, LENNOX, and ROSE, JJ.

R. T. Harding, for the prisoner.

The Crown was not represented.

*1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned at the trial; . . .

December 28. MEREDITH, C.J.C.P.:—We think that leave to appeal should be granted: and that a case should be stated involving such questions as these:—

Should the demurrer to the indictment, or the motion to quash it, have been allowed?

If so, does the verdict make it good?

Could the amendments of the indictment which were made at the trial rightly have been made without the privity of the grand jury?

Should they have been made in any case?

Was there any such impropriety, or defect, in the proceedings at the trial, in any of these respects, that the prisoner should have been, or should be, discharged, notwithstanding the verdict?

Mr. Justice Riddell dissents.

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Leave to appeal granted; case to be stated.

A case was stated by HODGINS, J.A., as follows:—

“This is a case stated by me, The Honourable Mr. Justice Hodgins, under the provisions of section 1014 of the Criminal Code, for the purpose of obtaining the opinion of the Appellate Division for Ontario on the questions of law which arose before me as hereinafter stated.

“At the sittings of assize holden at Toronto in and for the county of York, on the 29th day of October, 1917, an indictment was found by the grand jury against Isaac Bainbridge, charging that he did ‘in the year of our Lord one thousand nine hundred and seventeen at the city of Toronto in the county of York publish a seditious libel contrary to the Criminal Code section 184.’ Upon the trial before me on the 22nd November, 1917, objection having been taken by counsel for the said Isaac Bainbridge by way of demurrer for defects said to be apparent on the face of the indictment, I refused leave to raise the question, the said Isaac Bainbridge having some time previously thereto, to wit, on the 9th November, 1917, pleaded to the said indictment. It appearing that on the 20th November, 1917, particulars had been delivered, and that the publications therein mentioned had been before the grand jury when they had found the said indictment, and in

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view of section 860 of the Criminal Code, I amended the indictment by changing the figures '184' into '134' and by adding the following words thereafter, 'to wit the matters contained in the annexed particulars.' The trial then proceeded, and at the conclusion of the Crown's case I ruled that the said Isaac Bainbridge was not called upon for his defence except as to publications put in evidence and marked as exhibits A, B, and D, the first two of said exhibits being duplicates and the latter being a publication containing as the matter complained of and read to the jury the first two letters on page 8 thereof. The said Isaac Bainbridge gave evidence on his own behalf, and admitted the publication of exhibits A, B, and D. The case was then submitted to the jury, who returned a verdict which was entered by me upon the record as follows: 'The jury find the defendant guilty on the within indictment with regard to the publications entitled "The Price We Pay" and "The Canadian Forward" issue of 10th October, 1917, with a strong recommendation to mercy.'

"Counsel for said Isaac Bainbridge having moved under section 1007 of the Criminal Code in arrest of judgment and for a reserved case, I, on the 28th day of November, 1917, dismissed the motion, and sentenced the said Isaac Bainbridge to nine months in the common gaol, and he is now in close custody.

"And whereas a Divisional Court of the Appellate Division of the Supreme Court of Ontario on the 28th day of December, 1917, by order having directed that a case should be stated raising the following questions for the opinion of the Appellate Division:—

"Now, therefore, I, the said The Honourable Mr. Justice Hodgins, do hereby state and sign the following case in order to raise the following questions, which, in the opinion of the said Divisional Court, were proper to be considered, viz.:—

"(1) Should the demurrer to the indictment have been allowed?

"(2) Should the motion to quash the indictment have been allowed?

"(3) If the two previous questions or either of them are answered in the affirmative, does the verdict make the indictment good?

"(4) Could the amendments of the indictment which were made at the trial be rightly made without the privity of the grand jury?

"(5) Should such amendments have been made in any case?"

"(6) Was there any impropriety or defect in the proceedings at the trial in relation to any of the matters above referred to so as to entitle the accused to be discharged notwithstanding the verdict of the jury?"

"And I make the record, papers, and exhibits at the said trial part of the stated case.

"Dated at Toronto this 16th day of January, A.D. 1918."

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January 21. The stated case was heard by MACLAREN and MAGEE, JJ.A., CLUTE, J., FERGUSON, J.A., and ROSE, J.

R. T. Harding, for the prisoner, argued that the indictment was bad on its face, and that its defects were not such as could be cured under sec. 898 of the Code, as the only amendments that could be made under that section were as to defects in matters of form, and not, as in the present case, in matters of substance. Reference was made to *Rex v. Thompson*, [1914] 2 K.B. 99; Russell on Crimes, 7th ed., p. 311. The indictment is bad for duplicity, in charging several offences under one count, contrary to sec. 853 (3) of the Code. The indictment before amendment did not state the details and circumstances as required by the Code, and the amendment was not in regard to matter of form, but of substance. It is not charged that the seditious libel is against any person; and, as particulars have been delivered of seven publications, in respect of which the accused has been found guilty of only two, it is impossible to know on what charge the grand jury acted. The case of *Rex v. Michaud*, 17 Can. Crim. Cas. 86, relied on by the Crown, is not applicable here, as the indictment covered a number of separate acts which the Crown elected to treat as one offence. The objections to the indictment are not such as are capable of being cured after verdict, under sec. 1010 of the Code.

Edward Bayly, K.C., for the Crown, argued that the indictment was not really in respect of seven separate charges, but in respect of several publications from which a seditious intent might be inferred. What was done in the way of amendment of the indictment by the trial Judge is justified under sec. 898. He referred to *Rex v. Yee Mock*, 21 Can. Crim. Cas. 400. The accused had full notice and was in no way prejudiced by the action of the Crown. The powers given by sec. 898 cannot be cut down by

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reference to the forms prescribed by the Act. Section 1010 of the Code is a conclusive answer to the objections taken on behalf of the accused. He relied on the cases cited by HODGINS, J.A., in his judgment on the motion for a reserved case, and referred especially to *Regina v. Hazen*, 20 A.R. 633; *Kelly v. The King*, 54 S.C.R. 220; *Ibrahim v. The King*, [1914] A.C. 599.

Harding, in reply, argued that the amendment made at the trial formed an absolutely new indictment, which could only be found by the grand jury. He referred to *Rex v. Law* (1909), 15 Can. Crim. Cas. 382, and to the cases on sec. 898 of the Code collected in Crankshaw's Criminal Law of Canada, 4th ed., p. 993 *et seq.*

March 1. MAGEE, J.A.:—Case stated by Mr. Justice Hodgins pursuant to the order of the Second Divisional Court.

The indictment preferred by the grand jury on the 29th October, 1917, contained only one count, and charged that Isaac Bainbridge did in the year 1917, at the city of Toronto, "publish a seditious libel contrary to the Criminal Code section 184." That was a charge of a single libel. Section 184, however, has no bearing upon seditious or other libel, but relates to an entirely different offence, and it was, no doubt, mentioned by mistake.

The only section of the Code which makes a seditious libel punishable is sec. 134,* which was of course intended.

The accused on the 9th November, 1917, pleaded "not guilty" without making any objection.

On the 20th November, particulars were, without any previous demand therefor, delivered by the prosecution to the solicitor for the accused. They begin: "The following are the particulars in the seditious libel published by Isaac Bainbridge at Toronto in the year 1917 as charged against him in the indictment herein. That Isaac Bainbridge did in the year of our Lord one thousand nine hundred and seventeen in the city of Toronto . . . contrary to section 134 of the Criminal Code . . . publish seditious libel by publishing the following pamphlets." Then follow paragraphs 1 to 7, mentioning respectively seven pamphlets, each

*134. Every one is guilty of an indictable offence and liable to two years' imprisonment who speaks any seditious words or publishes any seditious libel or is a party to any seditious conspiracy.

bearing a different title to the others, except that the seventh is not stated to have any title, and the seditious character and the purpose of publishing each is stated separately in its own paragraph, but no reference is made to any particular part or passage of any of them.

These particulars in fact set out, in so far as they did set out, seven different seditious libels.

At the opening of the trial, on the 22nd November, 1917, and before the jury was called, counsel for the accused took objection, by way of demurrer, to the indictment as too general and disclosing no offence and being insufficient and bad and not amendable, and asked also for leave, under sec. 898 of the Code, to move to quash it, and in the alternative asked that the Crown should be restricted to one of the seven pamphlets, and should elect upon which one the trial would proceed, and should specify the particular passages alleged to be seditious. Counsel for the Crown declined to restrict the prosecution to any one pamphlet or to elect as to any or to specify any part of any, and also declined to ask for any amendment of the indictment except to substitute sec. 134 for sec. 184, which was done, the accused not consenting; and subsequently, on the Crown counsel's application, a further amendment was made by adding to the indictment the words "to wit in matters contained in the annexed particulars," a copy of the particulars being annexed to the indictment.

The objections made for the defence were overruled and the applications refused.

Thus, instead of a single seditious libel being charged, as had been by the grand jury, their presentment was made to cover, and in one count, all the seven different pamphlets alleged to be seditious. The trial proceeded, and the learned trial Judge held that as to five of the seven there was not proof of publication, but he left the other two to the jury, who, as their verdict is entered upon the record, found "the defendant guilty on the within indictment with regard to the publications intituled 'The Price We Pay' and the 'Canadian Forward' issue of 10th October, 1917, with a strong recommendation to mercy."

Counsel for the defence then moved in arrest of judgment. Subsequently this motion was refused, and the defendant was sentenced.

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The questions now submitted to the Court are:—

(1) Should the demurrer to the indictment have been allowed?

(2) Should the motion to quash the indictment have been

allowed?

(3) If the two previous questions or either of them are answered in the affirmative, does the verdict make the indictment good?

(4) Could the amendments of the indictment which were made at the trial be rightly made without the privity of the grand jury?

(5) Should such amendments have been made in any case?

(6) Was there any impropriety or defect in the proceedings at the trial in relation to any of the matters above referred to so as to entitle the accused to be discharged notwithstanding the verdict of the jury?

It should be noted that the learned trial Judge in his statement of the case says: "It appearing that on the 20th November, 1917, particulars had been delivered, and that the publications therein mentioned had been before the grand jury when they had found the said indictment, and in view of section 860 of the Criminal Code, I amended the indictment." The record, papers, and exhibits at the trial are made part of the stated case. If this is intended to include the learned Judge's charge to the jury, it would appear therefrom that the pamphlet "The Price We Pay" was published on the 24th July, 1917, and the "Canadian Forward" objected to was published on the 10th September, 1917. In the particulars the former is thus referred to: "'The Price We Pay,' a pamphlet in which assertions are made that His Majesty's Government is conducting the present war on behalf of a limited class of His Majesty's subjects and against the interests of the majority and for the purpose of persuading His Majesty's subjects to oppose His Majesty's Government in the prosecution of the present war." The other is thus mentioned: "(4) 'The Canadian Forward,' a pamphlet declaring that His Majesty's Government is actuated by motives and purposes directly contrary to religion and morality in the conduct of the present war." I do not find anywhere any suggestion that these two, or indeed any of the seven pamphlets, were connected or related so that they could be considered one libel.

The provisions of the Criminal Code as to the offence of seditious libel are secs. 132, 133, and 134. Section 132 declares that

a seditious libel is a libel expressive of a seditious intention; sec. 133 states that certain intentions in good faith shall not be deemed seditious intentions; and sec. 134 declares that every one is guilty of an indictable offence and liable to imprisonment who speaks any seditious words or publishes any seditious libel or is a party to any seditious conspiracy. The Code does not indicate what is a libel nor what is seditious. For that we have to go to the antecedent common law. And, excepting certain specific enactments in the Criminal Code, we must also refer to the common law for the rules and principles governing criminal pleading and procedure.

“The first general rule respecting indictments is, that they should be framed with sufficient certainty:” 1 Chitty’s Criminal Law, 2nd ed., p. 169. “For this purpose the charge must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offence, and the defendant be put upon his trial in chief for another, without any authority:” *ib.* “These precautions are also necessary in order that the defendant may know what crime he is called upon to answer, and may be entitled to claim any right or indulgence incident . . . as well as that the jury may appear to be warranted in their conclusion . . . and that the Court may see such a definite offence on record, that they may apply the judgment, and the punishment . . . ; they are also important in order that the defendant’s conviction or acquittal may insure his subsequent protection . . . ; the certainty essential to the charge consists of two parts, the matter to be charged, and the manner of charging it:” *ib.*, p. 169. “The indictment must state the facts of the crime, with as much certainty as the nature of the case will admit:” *ib.*, p. 171. “The cases of an indictment for being a common scold or barrator, or for keeping a disorderly house, or a common gambling-house, may be considered as exceptions to the general rule, but they differ materially from prosecutions for offences which consist of individual acts, as the very ground of complaint in these peculiar cases consists of a series of transgressions:” *ib.*

And an indictment for a libel must set forth the libel itself: *ib.*, p. 230. In *Sacheverell’s Case* (1710), 5 Har. St. Tr. 828, 15

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How. St. Tr. 466, 467, the unanimous opinion of the ten Judges was that "by the laws of England, and constant practice in all prosecutions, by indictment or information for crimes and misdemeanours, in writing or speaking, the particular words supposed to be criminal ought to be expressly specified in the indictment or information." In *Bradlaugh v. The Queen* (1878), 3 Q.B.D. 607 (C.A.), reversing the judgment of the Queen's Bench Division, *The Queen v. Bradlaugh* (1877), 2 Q.B.D. 569, it was held necessary to set out the words of an obscene libel unless there was an allegation excusing it for their unfitness. Bramwell, L.J., at p. 619, said: "Whatever reason can be given for setting out the very words in defamatory libels, is equally true in blasphemous, obscene, or seditious libels."

Now in what respect has the Criminal Code changed this law? Section 861 declares that no count for publishing a blasphemous, seditious, obscene or defamatory libel, shall be deemed insufficient on the ground that it does not set out the words thereof. But the very language used indicates that only *ipsissima verba* are waived, not the substantial references to identify the words or locate the objectionable parts.

So in sec. 855, which renders unnecessary the setting out of a document or of the words used. That section also removes objections for not naming or describing with precision any person, place, or thing. But the very preciseness of the word "precision" indicates that substantiality of description is not done away with.

Section 852 states that every count of an indictment shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some indictable offence therein specified; by sub-sec. 2, the statement may be made without any technical averments or any allegations of matter not essential to be proved; and, by sub-sec. 3, such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, or in any words sufficient to give the accused notice of the offence with which he is charged. But it is evident from sub-sec. 2 that matter which is essential to be proved is not to be omitted, and from sub-sec. 3 that the accused is to have notice of the offence and not merely of the character or class of the offence; while sub-sec. 1 requires that there is to be a substantial statement of an offence which, not

the class of which, is specified, and which must be an indictable one.

To give this sub-section any meaning such as is contended for here for the prosecution, would lead to absurd conclusions. Take sec. 570, which makes an indictable offence an attempt to commit an indictable offence not before specified and punishable with specified imprisonment. So with sec. 571. So with any of the serious offences, murder, robbery, rape, theft, could it be said to be sufficient to charge that the accused committed that crime without more? But sub-sec. 4 of sec. 852 gives the interpretation of that section in the forms, which, it says, afford examples, and in which that for defamatory libel sets out with substantial particulars, specifying besides the name of the person libelled, the date, the newspaper, the article, the parts relied upon, and the sense imputed, all which would be unnecessary if the contention for the prosecution here were correct.

Section 853, however, provides that so much detail of the circumstances of the alleged offence as to afford the accused reasonable information and to identify the transaction shall be given, but that the absence or insufficiency of such details shall not vitiate the count. And, by sub-sec. 2 of sec. 855, the general provisions of secs. 852 and 853 are not to be restricted or limited by other provisions in Part XIX. as to matters therein mentioned. Granted that full effect is to be given to sec. 853; it relates only to details of circumstances, and does not dispense with the substantial circumstances which constitute the offence. Sub-section 2 of sec. 853, as to reference to a section of the Code, does not help in this case, for the mention of sec. 134 or 184 gives no more information than the indictment without it.

None of these sections dispenses with the necessity, which existed previous to the Code, of a substantial statement of facts constituting and shewing by their statement that they constitute an offence.

It follows, I think, that the count as it originally stood was insufficient and demurrable.

The statement in the case submitted that the seven pamphlets were before the grand jury in itself precludes any amendment of the indictment, for they only charged one libel, though having seven before them, and it is impossible to know which one they acted upon.

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For all that can now be told, the accused may have been found guilty by the petit jury in respect of one or two libels which had one or both been ignored by the grand jury.

It would be most unfortunate and dangerous if such a thing could happen, and, so far as one can judge, it has certainly happened as to one of the two pamphlets on which the petit jury's verdict is based. It is unfortunate that the prosecution did not adopt the course of going back to the grand jury and having the indictment put in proper shape.

As regards the motion to quash, made as it was before the jury was called, and therefore before the accused was given in charge, I think leave should have been granted.

But, the record having been amended by adding six charges to the existing one, and there being nothing to shew that the charges were ever approved by a grand jury, the motion in arrest of judgment should, in my opinion, be granted. No such radical defect should be allowed to continue in effect.

I would answer questions 1 and 2 in the affirmative; questions 3 and 4, in the negative; question 5, "Not without the privity and consent of the grand jury;" question 6, "Yes, the accused was tried upon seven libels and is convicted upon two, when the grand jury had only found a bill upon one, which is not known to be either of the two."

The prisoner should be discharged.

MACLAREN, J.A., and ROSE, J., agreed with MAGEE, J.A.

CLUTE, J.:—Case stated by Mr. Justice Hodgins under the provisions of sec. 1014 of the Criminal Code. It arose upon the following indictment:—

"In the Supreme Court of Ontario.

"Ontario,

"The King

"County of York,

v.

"To Wit:

"Isaac Bainbridge.

"The jurors for our Lord the King present: that Isaac Bainbridge in the year of our Lord one thousand nine hundred and seventeen at the city of Toronto in the county of York did publish a seditious libel contrary to the Criminal Code section 184."

To this the defendant pleaded "not guilty" before objection taken.

The trial Judge amended the indictment by changing the figures 184 to 134 and by adding the words thereafter "to wit the matters contained in the annexed particulars."

Particulars were delivered as follows:—

"That Isaac Bainbridge did in the year of our Lord one thousand nine hundred and seventeen in the city of Toronto in the county of York, contrary to section 134 of the Criminal Code, being chapter 144 of the Revised Statutes of Canada, 1906, and amending Acts, publish seditious libel by publishing the following pamphlets:—

"(1) 'The World's Peace Foundation,' which pamphlet contains a speech made March 18, 1914, in the House of Commons at Westminster, by Philip Snowden, M.P., in which assertions are made that the action of His Majesty's First Lord of the Admiralty in asking for an increase in the naval estimates was made solely in the interests of an 'armament ring' and of private manufacturers rather than the public interest, and that such action was opposed to the public interest, the innuendo in publishing such pamphlet by the said Isaac Bainbridge being that the present war is being prosecuted by His Majesty's Government in opposition to the public interests, the purpose of such publication being to persuade His Majesty's subjects to oppose His Majesty's Government in the prosecution of such war.

"(3) 'The Price We Pay,' a pamphlet in which assertions are made that His Majesty's Government is conducting the present war on behalf of a limited class of His Majesty's subjects and against the interests of the majority and for the purpose of persuading His Majesty's subjects to oppose His Majesty's Government in the prosecution of the present war.

"(3) 'The Peril of Conscription,' a pamphlet containing the assertion that the present purpose of His Majesty's Government in the conduct of the present war is 'a conquest abroad and subjection of the working class democracy at home,' and inciting His Majesty's subjects to resistance against the enforcement of law in His Majesty's dominions, and more particularly against the enforcement of the Military Service Act, 1917.

"(4) 'The Canadian Forward,' a pamphlet declaring that His Majesty's Government is actuated by motives and purposes

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directly contrary to religion and morality in the conduct of the present war.

"(5) 'The Call,' an organ of international socialists, advocating 'the growth of revolutionary feeling among the masses of our own people' and inciting His Majesty's subjects to revolt against His Majesty's Government and to aid and assist persons carrying on war against His Majesty's Government and to intimidate and overawe His Majesty's Houses of Parliament in the United Kingdom and in Canada.

"(6) 'The Social Revolution,' containing statements that the present war is conducted by His Majesty's Government for purposes opposed to the interests of His Majesty's subjects in general and for the benefit of certain classes of His Majesty's subjects, and containing the innuendo that His Majesty's subjects should not longer support His Majesty's Government.

"(7) A pamphlet published for the purpose of organising His Majesty's subjects in societies for the purpose of resisting the enforcement of the law, and more particularly 'to render assistance to persons who, through adhering to certain principles, shall at any time be called or liable to be called before any civil or military tribunal created to enforce any act of compulsion;' all such publications being for the purpose of inciting His Majesty's subjects to resist His Majesty's authority."

The amendment as to the change of figures was properly made.

At the trial objection was taken by way of demurrer for defects said to be apparent on the face of the indictment. The trial Judge refused leave to raise the question, inasmuch as the accused had already pleaded to the indictment, and in view of sec. 860, which provides for the delivery of particulars. The trial proceeded, and a verdict of "guilty" was found with regard to two of the publications mentioned in the particulars, viz., "The Price We Pay" and "Canadian Forward."

Counsel for the accused applied, under sec. 1007, for a reserved case, which was refused, and the prisoner sentenced to nine months in gaol.

On application, the Divisional Court directed a case to be stated, and the following questions were prepared by the trial Judge, which in the opinion of the Divisional Court were proper to be considered:—

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(1) Should the demurrer to the indictment have been allowed?
 (2) Should the motion to quash the indictment have been allowed?

(3) If the two previous questions or either of them are answered in the affirmative, does the verdict make the indictment good?

(4) Could the amendments of the indictment which were made at the trial be made without the privity of the grand jury?

(5) Should such amendments have been made in any case?

(6) Was there any impropriety or defect in the proceedings at the trial in relation to any of the matters above referred to so as to entitle the accused to be discharged notwithstanding the verdict of the jury?

First, with reference to the indictment as found by the grand jury before the amendment was made. The real objection is that the indictment stated but did not shew that an offence had been committed, or, as was said by Bramwell, L.J., in *Bradlaugh v. The Queen*, 3 Q.B.D. at p. 615: “. . . as it may be put in somewhat different language, the objection was that the indictment simply averred that an offence had been committed, and did not shew how it had been committed.”

While the practice existing at that time was different from that authorised by the Code, nevertheless it is still necessary, in my opinion, that the particular offence should be stated in the indictment. The Code, while it simplifies the form of the indictment, does not eliminate this necessity.

Section 852 provides that every count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some indictable offence therein specified. This does not mean merely naming an offence, as “murder” or “theft,” but the offence itself must be specified. Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved, and may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, “or in any words sufficient to give the accused notice of the offence with which he is charged.” This last clause is very important. Subsection 4 of sec. 852, stating, “Form 64 affords examples of the manner of stating offences,” is an essential part of sec. 852, and clearly gives an outline of the indictment, and indicates the particularity with which it should be drawn.

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Reference to this form shews that it is not enough to say that A. committed murder or theft or perjury or the like, but the offence itself must be described with reasonable certainty. The form is given (*h*) for a defamatory libel, stating that "A. published a defamatory libel on B. in a certain newspaper, called the _____, on the _____ day of _____ 190____, which libel was contained in an article headed or commencing (describe with so much detail as is sufficient to give the accused reasonable information as to the part of the publication to be relied on against him), and which libel was written in the sense of imputing that the said B. was (as the case may be)."

When one remembers with what particularity the charge of sedition was required to be set out prior to the Code—and that practice still obtains in England (Archibald's Criminal Pleadings, 23rd ed., p. 986), and also in Canada except as modified by the Code—it becomes necessary to observe with great care to what extent the Code has changed the practice.

It will be found, I think, that, while great simplicity is introduced, the essential features of the former practice have not been changed. It is still, I think, necessary in every case, as expressly provided in the form referred to, that the indictment shall in itself reasonably identify not only the nature of the crime charged, but the act or transaction forming the basis of the crime named. This seems to me to be necessary, first in order that the accused may properly prepare for his trial, and shall be able to plead *autrefois acquit* if again charged, and that the accused may not, through mistake or otherwise, be put upon his trial on a charge which has not been passed upon by the grand jury, and that the trial Judge may know the particulars of the very act passed upon by the grand jury, and not some act which the Crown or Crown officer may say was the very act or transaction. The intervention of the grand jury between the Crown and the subject seems to me to be a protection to the subject which must be jealously guarded. It is still necessary in every case, as expressly provided in the form referred to, that the accused shall have reasonable information identifying the act for which the jury has committed him for trial. The charge in the indictment must be sufficient in itself to acquaint the accused with the particulars of the offence with which he is charged.

Section 859 provides that the Court may, if satisfied that it is necessary for a fair trial, order that the prosecutor "furnish a particular,—

"(a) of what is relied on in support of any charge of perjury . . . ;

"(b) of any false pretences or any fraud charged;

"(c) of any attempt or conspiracy by fraudulent means;

"(d) stating what passages in any book, pamphlet, newspaper or other printing or writing are relied on in support of a charge of selling or exhibiting an obscene book, pamphlet, newspaper, printing or writing;

"(e) further describing any document or words the subject of a charge."

While (d) is confined to the publication of an obscene book etc., seditious libel may be included in (e).

It is thus apparent, I think, that there must be a description of the document the subject of the charge in the indictment before particulars can be given "further describing any document."

This, read in connection with sec. 852, sub-sec. 4, and the form relating to defamatory libel, indicates with clearness what is intended and required as essential in the indictment.

The indictment must contain a valid count identifying the charge. Then the Court, being seized of the nature of the charge, may, if it thinks it essential to a fair trial, order the further particulars (further describing any documents or words "the subject of the charge.")

In the case of *The King v. Barraclough*, [1906] 1 K.B. 201, the indictment contained an averment that the libel was "in the form of a typewritten document, purporting to be extracts from a diary kept by the said William Barraclough, which said document was entitled 'Extracts from the Diary of the Rejected One.'" It was held that, although it would have been better for the indictment to have followed the old forms, and to have averred that the tendency of the obscene matter was to corrupt the public morals, the conviction might, under the circumstances, be upheld.

It will be seen here that the offence was described by a reference to a particular document which could be identified, and the case shews that under the practice the document itself was handed to the Court for the use of the trial Judge.

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I am of the opinion that, upon the face of the indictment, there was no charge made upon which the accused could be put upon his trial.

It is pointed out in *Rex v. Waters* (1848), 1 Den. C.C. 356, that there is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively; the latter may be aided by the verdict, the former cannot.

I think in this case the proper course to pursue would have been, instead of amending the indictment without the privity of the grand jury, to have submitted it again to the grand jury, after amendment, for their privity or consent, or to have had a new indictment presented.

Without a true bill upon a valid indictment presented by the grand jury there is nothing upon which the trial Court can act.

It is quite clear, I think, that no authority exists by which such an amendment can be made as to constitute an offence, when no definite offence is charged in the indictment. It is not a matter of form; it is a matter of substance; and the old formula, "You are content the Court shall amend matter of form altering no matter of substance," is not an idle phrase, but indicates, in my opinion, precisely the respective duties of Court and jury.

I am of the opinion that, under sec. 860, the delivery of the particulars was an amendment of the charge, and that, in so far as it could be properly made, it was effectively made. Under that section, it was unnecessary for the trial Judge to make or endorse a formal amendment; but I am of the opinion that the form of the amendment was such that it could not be properly made either under sec. 860 or by the trial Judge. The particulars disclose matter for seven distinct counts or indictments for the first time. The particulars sufficiently indicate or shew what the charge is; or, to put it in other words, the trial Judge introduces the seven counts by the amendment, when no charge is laid in the indictment.

These charges are quite distinct, whereas the indictment refers to "a seditious libel." There is nothing to shew whether the seditious libel mentioned in the indictment had reference to any or all or which of the seven charges appearing in the particulars.

With great respect for the opinion of the learned trial Judge,

I do not think the accused could be put upon his trial under the indictment, either as it stood before or after the amendment. The amendment was wholly nugatory; and the fact that the accused pleaded to the indictment does not, in my opinion, make any difference.

The proceedings in the present case would, under the old practice, have been by proceeding in error, but under the present practice, sec. 1014, the procedure is by a reserved case. As was said by Bramwell, L.J., in the *Bradlaugh* case (3 Q.B.D. at pp. 614, 615), "the decision which we have to pronounce is quite apart from the merits, and quite apart from the consideration whether any wrong has or has not been done."

It is of very great importance, nevertheless, that the practice should be settled as to what is necessary to constitute a valid indictment.

In my opinion the questions should be answered as follows:—

1. Should the demurrer to the indictment have been allowed?
A. "Yes."
2. Should the motion to quash the indictment have been allowed? A. "Yes."
3. If the two previous questions or either of them are answered in the affirmative, does the verdict make the indictment good?
A. "No."
4. Could the amendments to the indictment which were made at the trial be made without the privity of the grand jury? A. "No."
5. Should such amendments have been made in any case?
A. "Yes, with the privity and consent of the grand jury."
6. Was there any impropriety or defect in the proceedings at the trial in relation to any of the matters above referred to so as to entitle the accused to be discharged notwithstanding the verdict of the jury? A. "Yes, in proceeding to trial upon an indictment as framed, there being no authority to make the amendments without the privity and consent of the grand jury."

Section 1007 provides that the accused may at any time before sentence move in arrest of judgment; and sub-sec. 3 provides that, if the Court decides in favour of the accused, he shall be discharged from that indictment. This motion was made, and should have been allowed, and the prisoner discharged.

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This Court should now pronounce the judgment that should have been there given, and the prisoner be discharged from that indictment. This follows, I think, from the view above indicated, that there is no indictment upon which he can be tried, and that therefore a new trial cannot be granted; but this should not preclude the Crown, if so advised, from preferring a new indictment.

FERGUSON, J.A., agreed with CLUTE, J.

Prisoner discharged.

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[APPELLATE DIVISION.]

March 1.

REID v. MORWICK.

Husband and Wife—Business Carried on by Husband in his own Name—Capital to Start Business Furnished by Wife from Separate Estate—Increase by Exertions of Husband—Claim by Wife to Assets of Business as against Execution Creditor of Husband—Joint Venture—Partnership—Absence of Agreement as to Shares—Equal Shares—Married Women's Property Act, secs. 4, 7.—Husband's Share Liable to Satisfy Execution—Findings of Trial Judge—Credibility of Witnesses—Inferences from Evidence—Appeal.

In an action brought against a man and his wife by an execution creditor of the husband, the question was, whether or not the assets of a business carried on in the name of the husband were exigible under the plaintiff's execution, as against the claim of the wife; it appeared, among other things, that the business had been begun upon capital supplied by the wife from her separate estate, and had been increased and made profitable by the exertions of both of them, but especially of the husband; and it was held (HODGINS, J.A., and CLUTE, J., dissenting), that the husband had a "proprietary interest" in the business, that he and his wife were partners in it with equal shares (there being no agreement as to shares), and that the husband's share of the partnership business and assets was liable to satisfy the plaintiff's execution.

Sections 4 and 7 of the Married Women's Property Act, R.S.O. 1914, ch. 149, considered.

Cooney v. Sheppard (1895), 23 A.R. 4, *Laporte v. Cosstick* (1874), 23 W.R. 131, *In re Helsby* (1893), 63 L.J.Q.B. 261, and *In re Simon*, [1909] 1 K.B. 201, applied and followed.

Judgment of MIDDLETON, J., reversed—the majority of the Court, while accepting his findings as to the credibility of the witnesses, refusing to adopt the inferences drawn by him from the evidence.

APPEAL by the plaintiff from the judgment of MIDDLETON, J., at the trial, dismissing the action with costs.

The action was brought by an execution creditor of the defendant William Morwick against him and his wife, Mary Ann

Morwick; and the issue tried was, whether or not the assets of a business carried on in the name of the defendant William Morwick was exigible under the plaintiff's execution. These assets were claimed by the defendant Mary Ann Morwick as her own; and the learned trial Judge sustained her claim.

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January 21 and 22. The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., CLUTE, J., and FERGUSON, J.A.

Peter White, K.C., and *W. H. Lockhart Gordon*, for the appellant. The ground of objection to the judgment of the learned trial Judge is not so much that his findings of fact were erroneous, as that he had failed to draw the proper conclusion from the facts. The evidence shews that the husband was the trader, the business was carried on in his name, the letter-heads and bill-heads were in his name, he conducted the correspondence, and signed cheques and deposit-slips in his own name. The reason alleged for following this course is a flimsy one—that she did not wish to humiliate her husband. There is no agreement in writing to support the contention that it was her business, and the only real ground for such a view is that she furnished at most \$800 of the capital. In these circumstances the wife cannot be heard to allege that this was a business carried on by her in which her husband had no “proprietary interest” within the meaning of the Married Women's Property Act, sec. 7 (1). The wife exercised no control over the business, for the purposes of which the husband gave a chattel mortgage on the chattels used in the business, and also a mortgage on land in which she had no interest. He had no fixed remuneration, but drew what he needed from the business. [MACLAREN, J.A., suggested that a partnership between husband and wife might be found by the Court if the facts supported such a view.] Reference was made to *In re Gearing* (1879), 4 A.R. 173, *per Moss*, C.J.A., at p. 178; *Dickinson v. Valpy* (1829), 10 B. & C. 128, 140; *Walker v. Brown* (1916), 36 O.L.R. 287, 30 D.L.R. 204, which was said to be distinguishable from the case at bar on various grounds; *Harrison v. Douglass* (1877), 40 U.C.R. 410; *Campbell v. Cole* (1884), 7 O. R. 127, *per Boyd*, C., at p. 134, where he distinguishes that case from *Murray v. McCallum* (1883), 8 A.R. 277; *Ford v. Whitmarsh* (1840), *Hurl. & Walm.* 53, 58 R.R. 895; *Walter v. Ashton*, [1902] 2 Ch. 282. [CLUTE, J., referred

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to *Walker v. Hyman* (1877), 1 A.R. 345.] Reference was also made to *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175; *Long Dock Mills Co. v. Dickey* (1915), 7 O.W.N. 692, 695, and cases there cited by Latchford, J.; *Meakin v. Samson* (1878), 28 U.C.C.P. 355. The estoppel in this case does not depend upon any express statement but on the wife's general course of action: *Carr v. London and North Western R.W. Co.* (1875), L.R. 10 C.P. 307; *Jorden v. Money* (1854), 5 H.L.C. 185; *Martyn v. Gray* (1863), 14 C.B.N.S. 824.

A. M. Lewis, for the defendants, the respondents, argued that, when the trial Judge said that the business was carried on by the husband, he did not mean that the husband had any proprietary interest in it. The wife, whose evidence is given full credit by the Judge, says that it was well-understood that the husband should have no pecuniary interest, and the money employed in it was stamped as her money, years before the business began. The mortgages would never have been given but for the husband's outside liabilities. This case, therefore, is clearly distinguishable from those on which reliance is placed by the appellant. The question is essentially one of fact, and has been decided in our favour by the learned Judge who tried the case. The wife was in the position of an undisclosed principal. She worked early and late in the business, was familiar with all its details, and had the real controlling power. The case is, therefore, altogether different from the ordinary case in which the object of the parties is to protect the property from the husband's creditors, while still retaining the benefit of his services. The defendant's position is well within the decision in *Walker v. Brown*, *supra*, which was the case of a drug business, of which the wife had no knowledge and never visited the premises: see that case at p. 292, and *Dominion Express Co. v. Maughan* (1910), 21 O.L.R. 510. The plaintiff cannot succeed on the ground of estoppel, as the evidence does not shew that any direct statement was made to the plaintiff that the business was the husband's, and the inference cannot be drawn from the matters of fact on which the plaintiff relies. The real question is one of agency, as pointed out by Meredith, J.A., in the *Maughan* case, p. 517, and must be found in favour of the defendants.

White, in reply, argued that, if the husband ever had a "proprietary interest" in the business, it was never divested, and the

amendment of the statute was rather in favour of his claim to the possession of such an interest.

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March 1. FERGUSON, J.A.:—Appeal from the judgment of Middleton, J., dated the 26th June, 1917, dismissing the plaintiff's action with costs.

The plaintiff is an execution creditor of the defendant William Morwick. The defendant Mary Ann Morwick is the wife of her co-defendant. The issue tried was, whether or not the assets of a certain business carried on in the name of the defendant William Morwick are exigible under the plaintiff's execution, they being claimed by Mary Ann Morwick. The action was prosecuted on the basis that any claim of the defendant Mary Ann Morwick to the goods sought to be made liable in execution was dishonest. It was, however, clearly established that her money was used to purchase the plant with which the business was commenced, and in her testimony she stated that she neither gave nor lent that money to her husband; also that it was well understood that everything was hers, and not her husband's. The learned trial Judge accepted this testimony as trustworthy. The understanding deposed to does not appear to be based on any agreement, but to be simply an inference, in which the learned trial Judge agrees. His mind does not appear to have been directed to the idea that the transaction between the husband and wife might have been in the nature of a joint venture.

To my mind, the result turns on the proper inferences to be drawn from the acts of these parties, accepting the finding of the trial Judge that the evidence of the defendants as to what they severally said and did was trustworthy. In accepting this finding, but refusing to adopt as binding the understanding of either of these witnesses, or the inference of the trial Judge, I do not mean to depart from the usual practice of this Court of accepting the findings of the trial Judge as to the credibility of the witnesses.

It is common ground that the defendants, husband and wife, were, prior to 1893, engaged in the occupation of farming on a farm owned by the husband; that in 1893 they moved into Niagara Falls, Ontario, where for eight or nine years the husband worked as a carpenter and latterly as janitor of the Collegiate Institute, during which time he supported his wife and family out of his

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earnings; that, prior to moving to Niagara Falls, the wife had received a legacy, a part of which she lent to her husband, taking from him as security a second mortgage on his farm; that in 1901, the wife being of the opinion that the husband's occupation did not agree with him, and that he should have some out-door employment, they consulted together and bought a milk-route in Niagara Falls; that the purchase-money, \$500, was raised by the wife, Mary Ann Morwick, pledging the second mortgage she had on her husband's farm; that the husband made the bargain for the purchase of the milk-route, and the horses, waggons, cans, and other chattels that went with it, and took delivery and possession thereof, and started to do business with these chattels in his own name; that, in the spring of 1902, the parties sold out the milk-business, and opened up, in premises rented by the husband, an ice-cream business, buying the ice-cream manufacturing utensils and the equipment from a druggist in the town, the purchase-price thereof being \$500; that both the husband and wife took part in the negotiations for the purchase, but the transaction of the purchase and sale of these chattels and the taking possession thereof was carried out by the husband, William Morwick, in his own name, and from that day down to the present time, a period of 15 years, the business has been carried on by William Morwick in his own name; and that from the use of these chattels and the work and services of William Morwick, assisted to some extent by his wife, assets have accumulated, valued, in the statement rendered to the Imperial Bank in the year 1915, at about \$12,500. During all these years, William Morwick, with the knowledge and consent of his wife, carried on the business and every transaction in connection therewith in his own name. The bank-account has been in his name, the signs on the business premises, on the waggons, on the stationery, and on other advertising mediums have been "William Morwick, Ice-Cream Manufacturer." The business has been extensively advertised in the local newspaper as the business of "William Morwick, Ice-Cream Manufacturer." The ledger and other books of account have been kept in the name of William Morwick. Machinery, horses, waggons, and other chattels have been purchased for the purpose of extending and increasing the business, all in the name of William Morwick. Notes were given to the bank in the name of William Morwick, and

all cheques on the bank-account were issued by him, and he issued cheques on that bank-account not only for the purposes of the business, but for his own purposes outside of this business. He dealt with the customers and creditors of the business as his own. He pledged his credit and gave his time, labour, and skill to the business, as fully and completely as he could have done, were it conceded that he was at all times the beneficial owner thereof.

From the moneys which he says his wife allowed him to take out of the business, William Morwick bought a property, 74 Simcoe street, Niagara Falls, taking the conveyance in his own name. This he did with the approval of his wife; and, with her knowledge and consent, he, in 1913, in his own name, gave to the Imperial Bank a chattel mortgage to secure an indebtedness incurred by him in raising money to buy machinery for this business, and in raising money by the discounting of his note to invest in a venture outside of the business in question.

About the year 1913, he became interested in an outside venture known as the Gordon Construction Company, and the judgment which it is sought in this action to enforce was secured on a note given in connection with that outside venture, and it was not until the plaintiff recently attempted to realise on this judgment by execution that the defendant Mary Ann Morwick asserted her ownership of the chattels and business which were in her husband's possession, and which he had been carrying on.

Down to this point I have attempted to state facts which I think are admitted by both sides. We must now deal with the evidence to ascertain just why and how the business was established, who carried it on, was the money that went into purchasing the plant and establishing the business a gift from the wife to the husband or was it a loan, or was it the placing of money in a joint venture with her husband, or was this business, as found by the trial Judge, the exclusive business of the defendant Mary Ann Morwick, in which her husband had no proprietary interest, although established and carried on by him if not entirely alone, at least working in conjunction with his wife?

In differing from an experienced trial Judge as to the proper inferences, it seems to me that I should, in deference to his opinion, quote from the evidence.

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William Morwick's examination, p. 37:—

"Q. The first business you had gone into was the milk-route?

A. Yes, sir.

"Q. Who was that purchased from? A. A man by the name of Emmett.

"Q. And who negotiated the sale—that is, you had the dealings with them? A. I spoke to Mr. Emmett about it. I knew that he wanted to sell.

"Q. And who made the bargain? A. I spoke to him.

"Q. Who made the bargain? A. I made the bargain."

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"Q. How much did you give for the business? A. I gave—\$600 was paid for the business.

"Q. You gave \$600? A. I did not say I gave.

"Q. I understood you did? A. There was \$600 given for the business.

"Q. You started to say, 'I gave,' and then you hesitated? A. Yes.

"HIS LORDSHIP: Where did you get the mony that you paid for it? A. Mrs. Morwick.

"Q. When the business was sold, was it for how much—in the spring of 1902 I think you said? A. About the same price.

"HIS LORDSHIP: You sold it for \$600. What did you do with them? A. We put them into the ice-cream business.

"Q. Now who did the dealing with Frank? (Purchaser of the milk business.) A. Mrs. Morwick and myself.

"Q. What did Mrs. Morwick do—who actually fixed the price? A. I decided that it ought to be worth as much as we gave for it, for it was better when I sold it than when we bought it.

"Q. Who closed the bargain (sale of the milk-route)? A. Well, I do not know that any one of us in particular, Mrs. Morwick and I together.

"Q. Then you bought the ice-cream business from whom? A. Harry Smith.

"Q. And who did the business with Smith? A. Mrs. Morwick.

"Q. Alone? A. With my assistance.

"Q. You and she went to Smith's office? A. To see the ice-cream business.

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"Q. Who was Smith? A. A druggist.

"Q. What did he have to sell? A. Machinery.

"Q. Machinery? A. Yes, tubs and packers.

"Q. So really then, it was the utensils for making ice-cream and packing it and freezing it? A. Yes.

Q. Did you buy these? A. They were boughten.

"Q. You bought them? A. Yes.

"Q. For how much? A. \$500.

"Q. And did you remove them from his place? A. Yes, sir.

"Q. And took them down to where? A. To the milk-depot.

"Q. The place you had rented? A. Yes."

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"Q. Then at the time when you went into the ice-cream business, was any arrangement made by you and your wife? A. I was to operate it.

"Q. You were to operate it, what else? A. What more was there?

"Q. I beg pardon? A. What more was there to do?

"Q. That was all that was said between you and her, was it? A. No, she would buy it if I would run the business.

"Q. Beg pardon? A. She would buy it if I would run the business.

"Q. Nothing else? A. I cannot remember all that was said 15 years ago.

"Q. About your part of it—you see I cannot lead you yet—will you tell what you did, if that was the only bargain you had with her? A. The substance of it.

"Q. About the ice-cream business? A. The substance of it.

"Q. Then I take it that your remuneration for running the business was not fixed in any way? A. No, sir.

"Q. And there was no written document between you and your wife defining your position? A. No.

"Q. Or any document of any kind or any bargain other than you have told us between you and her—then when did you first open up the bank-account in connection with the ice-cream business? A. When I first started into it.

"Q. And the account was opened up in your name? A. In my name.

"Q. Why? A. Because I was to manage the business."

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“Q. I suppose, as manager of the business, you conducted it as you saw fit? A. Yes, sir.

“Q. And no set wages? A. No, just what money I needed.”

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“Q. Now, from the very first—you will correct me—I understand that the business was conducted in your name? A. Yes.

“Q. And is to-day? A. Yes.”

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“Q. I see that in the statement of September 1st, 1915, you gave your net worth as \$12,500? A. That is what it is there.

“Q. Would that be correct? A. Pretty well inflated.

“Q. Pretty well inflated, is it? It was given to the bank for what purpose? A. To make it appear good on the books.”

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“HIS LORDSHIP: It is common ground that Mr. Morwick had entire charge of the business, consulting his wife from time to time.

“Q. Had you any other way of contributing to the support of your family except out of this business? A. No, sir.

“Q. Your whole time and attention was devoted to it—now you have the books of account here—will you shew any entries of any moneys withdrawn by you at any time from the partnership? A. No, sir.

“Q. Or do they shew any entries of any moneys withdrawn by Mrs. Morwick from the partnership? A. No, sir.

“Q. Now everything that you did in connection with this business was, I understand, with your wife’s consent and approval? A. Yes, sir.

Cross-examined by Mr. Lewis, counsel for the wife, p. 64:—

“Q. Now what did you get out of it (the business)? A. Well, I just got my clothing and what little money I had wanted to spend.

“Q. You never asked your wife what you were going to get out of it, did you? A. No.”

Re-examined by Mr. White, the plaintiff’s counsel, p. 65:—

“Q. Then just one general question. Did I understand you to say to Mr. Lewis, implying rather by your answer to him that no further capital was put into the business than the original investment, that the improvements amounting now to the costs

as shewn by your statement to the bank, that these were all met out of the profits of the business? A. Yes, sir."

Questions from the examination for discovery of Mary Ann Morwick (see the evidence at p. 14):—

"Q. And there was no agreement in writing, or anything else in writing, shewing what your husband was to get for doing the work in connection with the business? A. No.

"Q. Now, had you any verbal agreement with him about that? A. No.

"Q. How long has he carried on this business for you? A. About 14 years.

"Q. The only money you have put in since the business was started was the \$800, and everything was bought out of the profits of the business? A. Yes."

Trial evidence—Mrs. Mary Ann Morwick, examined by her own counsel, Mr. Lewis:—

"Q. And then a milk-route was purchased? A. Yes.

"Q. Will you tell me why that was purchased and who suggested it? A. Well, my husband had been some time at the Collegiate working—

"Q. Yes? A. And it did not seem to agree with him, and I began to be anxious about him, and thought I would try and get some outdoor employment; and, as there was not a milk-route depot, I should say, at Niagara Falls, I thought it might be a good thing if he could manage it, and we consulted together.

"Q. Then—go ahead? A. Then we, of course together, looked around to see what could be done about it.

"Q. Yes? A. And we knew of a man by the name of Emmett who wanted to sell his route in that way, and we raised the money.

"Q. Now, will you tell me how you raised the money? A. Well, our original farm was not sold yet, and I had the second mortgage.

"Q. Yes? A. I raised the money on the second mortgage.

"Q. That is the assignment you heard spoken of this morning? A. Yes.

"Q. And that is where you got the money? A. Yes, that is where I got the money to buy the milk-route.

"Q. Now then you went on, you sold that business, didn't you? A. Sold the milk-business.

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"Q. While you were still in this rented place? A. Yes.

"Q. Then what did you do? A. Then we went into ice-cream then, stronger; I opened an ice-cream parlour after that."

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"Q. Now, did you have any arrangement at all with your husband, as to what he was to get? A. No.

"Q. What were your husband's needs, anyway, what did he draw? A. Oh, he took money to provide for himself.

"Q. Did you give or loan this money that went into this business to your husband? A. No. I did not loan money to my husband."

Being examined in reference to the purchase by her husband in his own name of a real property known as 74 Simcoe street, and not in question in this action, this witness says, at p. 75:—

"A. Well, we talked it over together, of course, and I considered it was a good investment for him.

"Q. Well, he got the money to pay for that—do you remember how it was paid, did he get it weekly from you? A. To pay into the land?

"Q. Yes? A. The rent of the house nearly pays it, and the rest he got from me.

"Q. And the rest he got from you? A. Yes."

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"Q. Then, as a matter of fact, you first started business in the ice-cream business, the original bank-account was opened in your husband's name? A. Yes.

"Q. Why? A. It was more convenient to have it that way.

"Q. So there is no reason in that—what other reason have you? A. No other reason—I did not wish to humiliate my husband by advertising to everybody that I owned everything, and he nothing, it was well understood between he and I that things were mine and not his—

"Q. And I suppose you knew, of course, there was danger of people giving credit—in other words, what you wished to do was to let the public understand that the business was your husband's? A. I did not consider the public at all. I was not thinking about that.

"Q. You must have when you spoke about not wanting to humiliate your husband? A. It was he I was thinking of, not the public.

"Q. But you did not want the public to know that you were owning all this business, because that would humiliate your husband, as I understand it, is that correct? A. Yes.

"Q. And that was one of the reasons why the business was run in his name, and the bank-account kept in his name? A. Yes.

"Q. In fact, might I say the only reason—he had no debts that you wished to protect him against? A. He had not any debts.

"Q. So that there was no other reason? A. No, I cannot say there was any other reason."

To my mind the proper inference to be drawn from the evidence of these two witnesses which I have quoted is, that the husband and wife went into a joint venture. True, the original capital of \$500 was raised by the wife pledging the mortgage which she had on her husband's farm, but the businesses were established for the benefit of both of them. The primary object of the establishing of the business was to give the husband an outdoor occupation; and throughout her evidence the wife says they consulted together, they negotiated together; there was no agreement that he was to give his time and work, skill and ability, exclusively for the benefit of his wife, and it was his work, skill, and ability that made and accumulated the business and assets. There was no discussion or agreement as to who owned the business. The question never arose between the parties. The wife admits that the husband took out of the business what he needed, and she took out of the business what she needed. If this transaction had taken place between strangers, I think that the trial Judge would have concluded that it was a joint venture. The effect of the trial Judge's holding is, because the wife furnished the original capital, not for the purchase of a going concern, but for the purchase of a plant for the purpose of starting up a business which her husband was to conduct and to which he was to devote his whole time and ability, and to which he has devoted his whole time and ability for years, to deprive him and his creditors of any remuneration for his services. The only statement in the evidence against holding that there was no arrangement as to the ownership of the business, and the profits therefrom, is the statement made by the defendant Mary Ann Morwick at the end of one of her answers on p. 80: "It was well understood between he and I that things were

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mine and not his." That statement is contrary to her other statements, and is contrary to the course of conduct and dealings of these parties for a period of 14 years, and is contrary to the possession and control of the business, and is contrary to the fact that William Morwick pledged his own credit and became liable for all transactions in connection with carrying on and developing the business. To that statement of Mrs. Morwick, I apply the remarks made by the learned trial Judge to the plaintiff at p. 7 of the evidence, when the plaintiff was endeavouring to make out estoppel by shewing that, when he discounted the note sued upon, he did so on the *understanding* that William Morwick was the owner of this ice-cream business.

"HIS LORDSHIP: Understanding does not determine a law-suit. You must tell me he said something, and what they said, and not an understanding."

By the rules of common law husband and wife were regarded as one person, the legal existence of the wife during the marriage being regarded as merged into that of the husband; and the wife was incapable, with some exceptions, of acquiring or enjoying any property independently of her husband: Halsbury's Laws of England, vol. 16, p. 321, para. 634. See also Broom's Common Laws, 9th ed., p. 677.

The Married Women's Property Act, now R.S.O. 1914, ch. 149, modified the common law by enacting:—

"A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract . . . as if she were a *feme sole* . . ." (sec. 4, sub-sec. 2).

"Every married woman, whether married before or after the passing of this Act, shall have and hold as her separate property, and may dispose of as such, the wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged or which she carries on and in which her husband has no proprietary interest, or gained or acquired by her by the exercise of any literary, artistic or scientific skill" (sec. 7, sub-sec. 1).

From which I take it that the rules of the common law prevail unless it is made out affirmatively by Mary Ann Morwick: (1) that she was possessed of separate estate and thereby empowered

to contract in reference thereto as a *feme sole*; or (2) that she was engaged in or carried on a business in which her husband had no proprietary interest. Under the first head we must inquire as to what contract she made with her husband; under the second, did she carry on a business in which her husband had no proprietary interest? On the argument counsel assumed that the rights of the parties were governed by sec. 7. I have a contrary opinion, but will first deal with the case on that assumption, and later develop the reason why I think sec. 4 governs. The husband and wife were engaged in a business carried on in his name, on his credit, and to some extent for his benefit. He was personally liable for the losses of the business, and to an indefinite extent entitled to share in its profits. He was in possession and control of the assets of the business, all of which, to my mind, raise a presumption of ownership which it was necessary for the defendant Mary Ann Morwick to explain away. It is admitted that the legal title in the trade-name, chattels, horses, goods, waggons, bank-account, was in William Morwick. Whether or not the holding of the legal title without beneficial ownership would, within the meaning of sec. 7 of the Married Women's Property Act, establish in William Morwick a "proprietary interest," depends on how we interpret the Act.

In *Cooney v. Sheppard* (1895), 23 A.R. 4, Osler, J.A., considered the meaning of the words "proprietary interest" as used in this section; and his opinion is stated as follows (p. 6):—

"The meaning of the expression is not defined, and although it is an unusual one, I have no reason to suppose that it is employed in any technical or limited sense. It signifies 'interest as an owner' or 'legal right or title.'"

Under that definition the husband holding the legal title would, I think, have a proprietary interest: but I prefer to rest my judgment on the opinion that the proper inference to be drawn from the evidence is, that William Morwick not only had the legal title but that he had as well a beneficial interest in the business, whether the rights be determined under sec. 7 or sec. 4.

In its facts, this case is not unlike *Laporte v. Cosstick* (1874), 23 W.R. 131, the head-note of which is:—

"If a husband takes such a part in his wife's business as to make himself personally liable, the business is not carried on

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separately from the husband, within the meaning of the Married Women's Property Act, 1870." Blackburn, J., in delivering judgment in the Queen's Bench, says, at p. 133:—

"It appears . . . that the husband lived in the house. He gave orders for goods; he took the house from the landlord himself, and made himself liable for the rent. It is said on behalf of the wife that he did this as her agent. He sells the furniture as his own; he writes to tradesmen in his own name, and talks of the creditors as his. The Judge (trial) says that he did all this as his wife's agent, and at her request. Still the question remains, is he liable as principal in the business? If he had been living in adultery with a woman instead of with a wife, he would have been liable as a partner. By the finding of the Judge he has, as it is, made himself liable at the request of the wife, so that the business was so carried on as to make the husband liable at the request of the wife. Still the Judge finds that there was a separate trading. But I cannot agree with this finding. . . . The husband and wife may very well live together, and yet there may be a separate trading; the husband might for this purpose be only in the position of a lodger; but where, as here, the husband takes such a part in carrying on the business as to make himself personally liable, there cannot be a separate trading."

And Lush, J., at the same page, says:—

"This quite negatives a separate trading. To say that this was a separate trading would enable a man wrongfully to evade his creditors."

True, our Act differs from the English Act there under consideration; and the question in the action at bar is not whether there was or was not a "separate trading," but whether or not the wife carried on the business and the husband had no proprietary interest therein; yet I am not prepared to say that where, as here, the husband took the transfer of the property, carried on and established the business and the goodwill in connection therewith in his own name, and became personally liable for the obligations of the business, and dealt with its customers and creditors as his own creditors and customers, and the business and assets were derived not from the wife's work or wages, but from his work, efforts and skill, working with capital furnished by her, he had no proprietary interest in that business.

Having arrived at the conclusion that the husband had this proprietary interest, we have now to ascertain the extent thereof, so that it may be made liable in execution to satisfy the claims of his personal creditors. Had this venture been entered into between strangers, their shares in the profits and losses, I think, must have been declared to be equal.

Lindley on Partnership, 8th ed., p. 410:—

“In the event of a dispute between the partners as to the amount of their shares, such dispute, if it does not turn on the construction of written documents, must be decided like any other pure question of fact; and it has been decided that if there is no evidence from which any satisfactory conclusion as to what was agreed can be drawn, the shares of all the partners will be adjudged equal.

“This is still the law, for, subject to any agreement, express or implied, between the partners, the Partnership Act, 1890, enacts as follows:—

“24.—(1) All partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm.”

The learned author of the work from which I have just quoted, on p. 411, discusses the question why it is that the shares of the partners are, in the absence of an agreement, not fixed in proportion to their contributions to the capital, and points out that the skill, or the ability to command confidence, of one partner may exceed in value the money contribution of another, and that it would consequently be impossible to determine by capital contributions the shares of the partners in the business.

I am therefore of the opinion that, in this case, subject to the effect of the Married Women's Property Act, we should hold that the defendants were equal partners in the business in question, which on the winding-up would give to the wife a right to have her capital repaid before the other assets are divided.

The view has been expressed that, under the English Act, worded as our Act originally was, a wife possessed of separate estate may be engaged in partnership with her husband, and still be deemed, as to her interest in the business, to be carrying on that business separately, but that she could not in such a case, on

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the failure of the firm, be declared to be a bankrupt. See *In re Helsby* (1893), 63 L.J. Q.B. 261. That case was considered in *In re Simon*, [1909] 1 K.B. 201, in which the Court held that a wife could, as to her separate property, carry on a separate trading within the meaning of the Act, although the business was under the control of her husband. That case further decided that *In re Helsby* should be overruled in so far as it decided that there could not be under the English Act a declaration of bankruptcy; but I do not take it as dissenting from the proposition that the wife as to her separate property might be engaged in partnership with her husband: see Halsbury's Laws of England, vol. 22, p. 20, para. 32.

In my opinion, the effect of these authorities and the Married Women's Property Act is, that a married woman possessed of separate estate may enter into partnership with her husband, and, in respect of the business carried on with her separate property, have all the rights of a partner; on the other hand, where she has no separate estate, she may not enter into a trading partnership with her husband, because she cannot contract in reference to her personal services, except to the extent and in the manner permitted by sec. 7. Section 7 of the Act which I have quoted (*supra*) was not, I think, intended to cut down, but to extend, the power of a married woman to contract. The general purview of the Act is to enable her to contract only in reference to and so as to bind her separate estate; whereas sec. 7 is intended to extend that right so as to permit her to make use of her efforts, skill and ability, to acquire separate estate, and to enable her to do this even when she is not possessed of property, provided the employment she engages in or carries on is one in which her husband had no proprietary interest.

In the case at bar, Mrs. Morwick was possessed of separate property, in reference to which she could contract as a *feme sole*, and therefore enter into a venture with her husband and receive therefrom whatever share of the profits was agreed upon as hers notwithstanding the fact that he exercised control of the business: *In re Simon*, *supra*; from which it follows that, having, as I find, entered into such a joint venture without an express agreement as to her share, she is entitled to share equally with her husband therein.

I would allow the appeal and declare that the defendants are equal partners in the business carried on by them in the name of William Morwick, and that the share of the said William Morwick in the said partnership business and assets is liable to satisfy the plaintiff's execution.

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MAGEE, J.A.:—I would have been inclined to come to the conclusion rather that the business carried on by the defendant husband in his own name during so many years was his and that the wife was his creditor for the moneys she had put in. The case is one, I think, in which she, doubtless honestly, is trying, after her husband has made a loss, to have effect given to her own inferences as to what ought to be the result of what took place during the long period when they did not anticipate any difficulties and had no reason for caution or to act otherwise than naturally. But, as my brother Ferguson is of opinion that it is their joint business, and the effect is probably the same as regards the plaintiff, I do not think I should differ, and therefore I agree in his conclusion.

MACLAREN, J. A., agreed with MAGEE, J.A.

HODGINS, J.A.:—The change in the statute which eliminated the words "separately from her husband" has been considered in *Robertson v. Larocque* (1889), 18 O.R. 469, by MacMahon, J., who says, at p. 474:—

"This section" (the present one) "puts it beyond question that a married woman's earnings in a trade or occupation in which her husband has no proprietary interest is made separate property by the statute."

Osler, J.A., sitting alone, in *Cooney v. Sheppard*, 23 A.R. 4, says, at p. 6:—

"The question no longer is whether the proceeds or profits which the husband's creditors are attempting to grasp are derived from an occupation or trade which the wife carries on separately from her husband, but whether the 'property,' whatever it may be, has been 'gained or acquired by her in an employment, trade or occupation in which she is engaged or carries on, and in which her husband has no proprietary interest.' That is the only

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limitation. The meaning of the expression is not defined, and although it is an unusual one, I have no reason to suppose that it is employed in any technical or limited sense. It signifies simply 'interest as an owner' or 'legal right or title.' If a married woman may be the owner or tenant of a farm, I know of nothing in the relation of husband and wife which forbids the latter, as the law now stands, from engaging in the occupation of farming and procuring her husband to manage and work the farm for her or as her agent or manager, more than any other trade or occupation which she may choose to carry on, although, no doubt, as the learned Judge below says, in what I may be permitted to characterise as a very able and careful judgment, 'the interference of the husband in the business must always be an element in determining the *bona fides* of the wife's claim.' "

I think this last quotation correctly describes the condition imposed by the statute on the acquisition of a separate estate in trade profits, i.e., the absence of proprietary interest in the husband. The wife may acquire this separate estate by engaging in a business with borrowed capital or with assets owned by others.

On the argument stress was laid upon the words "in which she is engaged or which she carries on" as requiring a sole and separate trading in fact. If this is correct, then the elimination of the word "separately" would seem to be unnecessary. The wife here was actually engaged in the business in so far as it was carried on inside the building, although outside and to the world it was carried on largely by the husband and wholly in his name. I think what she did, apart from what she owned in the business, fulfils that part of the enactment which requires the profits to be traceable to a business in which she is engaged or which she carries on.

There are undeniably in this case elements which, but for the learned trial Judge's finding, would give rise to suspicion and inquiry. But the true view of the business relations of husband and wife depends so essentially upon the trial Judge's estimate of their good faith that I would hesitate long before disregarding it when, as here, he gives them entire credence. The appellant is a judgment creditor of the husband, and seeks to render the accumulated profits of this business liable for his claim. He can take no more

than the husband's property. No claim is made by the husband to an interest in the business. The honesty of that position is the vital point in the case. If it is shewn to be untrue, then the appellant is entitled to have his execution satisfied out of what is really the husband's property, not otherwise. But, if the husband and wife are believed, then, granted that everything took place just as proved, yet there is no escape from the position that, if the appellant is entitled to take this property for his debt, the substance must be disregarded and the form preferred.

The fact that the husband, with his wife's consent, held himself out to the world as the owner of the business, that it was intended by both that he should do so, to avoid the humiliation of the contrary being known, would prevent the wife setting up her present claim if the appellant had become a creditor on the faith of that holding out. But estoppel does not give the husband a proprietary interest; it merely, and to the extent of the creditor's claim, ignores the true state of facts because it would not be just to allow them to stand in his way.

Nor does the course of dealing under which the husband made himself liable to creditors establish the fact that he has an interest. If he were sued by a trade creditor, he would have recourse against the assets only because he as agent would have the right to compel his principal to pay the debt. This does not make the assets his assets. Liability to creditors has been said in *Laporte v. Cosstick*, 23 W.R. 131, to negative separate trading. So has the entire conduct of the business by the husband: *Campbell v. Cole* (1884), 7 O.R. 127; *Harrison v. Douglass*, 40 U.C.R. 410; *In re Gearing*, 4 A.R. 173. But these are not now, as I have said, the test. It is the possession in law by the husband of a proprietary interest in the business in which the wife is engaged, or which she carries on, whether she does so separately or jointly as to assets or capital with persons other than her husband.

I do not think the Court should unduly restrict the words of the present section. It is intended to enable a married woman to acquire a particular species of separate estate, that is, moneys and property derived from trading. The only condition imposed is that it shall not be derived from a business of which the husband is proprietor in whole or in part, but from one in which the wife shall either be engaged or which she carries on. As I have

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mentioned, the assets of the business or the capital may be supplied by others or by the wife herself. In that way this particular kind of separate property is produced by her exertions or her money, and should properly belong to her. The old idea that the husband owns and should own everything is quite obsolete, and ought not to be imposed again upon married women, especially at the present time, unless the Legislature itself compels that backward step.

It is unnecessary to deal with the question raised in *In re Helsby*, 63 L.J. Q.B. 261, i. e., whether the interest of a married woman in a partnership between herself and her husband is or can be separate estate; for, under our statute, the husband would have a proprietary interest in that business, and its profits would not be affected by sec. 7. To hold that the wife in this case has a half interest in the money and property derived from this business, if her husband is a partner in it, seems to be flying in the face of the statute.

Nor do I think it possible at the suit of an execution creditor to declare those to be partners who deny that relationship and whose testimony on that head has been believed.

I would dismiss the appeal.

CLUTE, J.:—The plaintiff is an execution creditor, in the sum of \$2,118.42 debt and \$150 costs, of the defendant William Morwick. The defendant Mary Ann Morwick is the wife of her co-defendant.

The issue to be tried is whether or not a certain ice-cream plant is exigible under the plaintiff's execution. It is not disputed that the wife put in the money, \$800, which, by increasing profits put into the business, bought the plant in question. The husband contributed no money whatever to the business, but gave his time.

The business commenced originally as a milk-route, purchased by the wife for \$800. This money was raised upon a mortgage which she held, representing an investment of money received from her father. That the money put in the original business belonged to the wife was not disputed. The milk business was continued for a time, and merged afterwards into an ice-cream business, which was carried on upon the premises owned by the wife. An addition was built to her house for the purpose.

During all the time that the milk business and ice-cream business were carried on up to the time of seizure, they were so carried on under the name of the husband, although the wife always took an active part in the actual conduct and management of the same. There was no written agreement between husband and wife as to what he was to receive for his services, nor was any amount specified. There was no registration shewing that the business was being carried on in his name for the benefit of the wife. There was a bank-account kept in the husband's name, the wife drawing the profits from time to time from this business-account and depositing the same in her own name.

The business developed to the extent that the plant was valued at from \$10,000 to \$15,000. Purchases were made, as the increased business demanded, out of the profits. The husband drew, for his private use, small amounts from time to time as he needed them, with the sanction of the wife. The sign and letter-heads were in the name of the husband—in fact the whole business was carried on, so far as outward appearances were concerned, and at the bank, as if the business was that of the husband. No one would have known from appearances that the wife had an interest in the same, beyond the fact possibly that she took an active part in the conduct of the business.

The husband became liable in a transaction of his own on a note discounted at the bank, and gave as security therefor, with the permission of the wife, but in his own name, a chattel mortgage upon the plant in question. He also gave a mortgage upon some real property owned by him. The chattel mortgage was in the usual form, and the property was referred to throughout, including the affidavit, as his property. As between the husband and wife, the advances by the wife for the husband exceeded certain payments by the husband for the wife by \$250—by that much he was the gainer. The plaintiff took the positions: (1) that the business was the business of the husband, notwithstanding the fact that it was her money which originally went into the business; (2) that the wife was estopped from denying that the business was that of the husband, owing to the manner in which it was conducted in his name.

The defendants contended that the husband had no proprietary interest in the business within the statute, R.S.O. 1914, ch. 149,

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sec. 7. The trial Judge points out that, when the statute that had given rise to much litigation was recently revised, care was taken to remove the difficulty that existed that had given rise to the earlier cases, and the statute as it now stands entitles her to the profits and proceeds of any business in which her husband has no proprietary interest, "and so the question I have to face in this case is the question of fact whether the husband had or has any proprietary interest in this business."

Dealing then with the question of fact, he says: "Now fortunately the case is in many respects simple, because, in the determination of the question of fact, I am glad to be able to say that I can place entire confidence in the statements of both the husband and wife. It is not a case in which I distrust their statements and seek by tests and criticism to find out if they are making statements which are untrue or the whole story they tell is a fabrication, because I accept the story as they tell it. That relieves me from going through the facts that have been relied upon in earlier cases to determine the questions that arose under the statute. Here the money had its origin entirely on the part of the wife. She fortunately inherited money, her husband unfortunately did not. He had a farm given him by his father, but that farm was originally subject to two mortgages, and apparently she took up the second mortgage or in some way became the second mortgagee of that property. When that property came to be realised upon, there was nothing left to represent the husband's equity of redemption; her money alone was in existence when they came to start life anew at Niagara Falls."

The learned trial Judge summarises the evidence in regard to her interest in the business, but points out that she paid for the milk business by hypothecating a mortgage and raising \$800, which went to pay for the milk-route business; that she had to use her money for the purpose of purchasing the ice-cream business, "so that at that time that was her business." "The question from that time on is, firstly, whether she made a gift to her husband. I do not think she did. Secondly, had the husband any proprietary interest in the business otherwise than by gift of the wife? I do not think he had. It was intended to be the wife's business. In one sense she acted foolishly in allowing the husband

to carry on the business in his name, but the carrying on of the business in the husband's name cannot give him a proprietary interest—there must be some intention to give a proprietary interest—unless all the circumstances entitle Mr. White to rely upon estoppel and to claim that by reason of her allowing her husband to carry on a business which was hers as a matter of fact, in his name, she is precluded from shewing what the true fact is. I do not think that a case, as I have said, of his proprietary interest has been shewn. That being a question of fact, that ends that branch of the case.”

He points out that in case of an estoppel it is necessary to shew not merely that there has been a holding out, but that the one who is claiming to set up estoppel is acting upon that holding out. He deals with this question from the evidence, and says: “The weakness of the plaintiff's case here is that the plaintiff has failed to satisfy me that he knew of this holding out and acted upon the faith of it.”

A careful reading of the evidence fully supports, in my opinion, the finding of the learned trial Judge. The plaintiff's judgment did not arise upon a debt connected with the business in question. He is asked in respect of this, and says that he did not know Mrs. Morwick; that the original judgment was upon a note given by the husband, and that it was not in connection with the ice-cream business, nor for goods supplied in connection with that business. The plaintiff further says: “I loaned money to the Gordon Construction Company on Mr. Morwick's note.” He says that Morwick was interested in the Gordon Construction Company, and he took his note with others upon which the money was advanced.

The plaintiff does not say, and there is no evidence, that the transaction had anything to do with the business, nor is there any evidence that the advance was made in consequence of any holding out of the business as the husband's; so that, in my opinion, there can be no estoppel: *Walker v. Hyman*, 1 A.R. 345. Blackburn, J., in *Swan v. North British Australasian Co.*, 2 H. & C. 175, at p. 182, as quoted in the *Walker* case, cites the rule laid down by Wilde, B., “if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and

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they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to shew that that state of facts did not exist." He adds: "This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also . . . that it must be the neglect of some duty that is owing to the person led into that belief." Burton, J.A., in the *Walker* case, referring to *Freeman v. Cooke* (1848), 2 Ex. 654, points out that "two things must concur: the party must so conduct himself that a reasonable man would consider it in the light of a representation, and believe that it was meant that he should act upon it; and the party for or to whom it was made must have acted on it as true." Here there was no evidence to support such findings. This is the undoubted law, and was applied in *Dominion Express Co. v. Maughan*, 21 O.L.R. 510, and in *Ray v. Gettas* (1915), 8 O.W.N. 318.

I fully agree with the learned trial Judge that there was no estoppel in this case. It is not necessary to repeat the transactions as between the husband and wife, which are fully, and, as I think, satisfactorily, dealt with by the trial Judge.

It was strongly urged by the plaintiff's counsel that, although the evidence was clear and accepted by the trial Judge that it was exclusively the wife's money that went into the business; and that it was her business that was carried on, and that the increased plant was purchased by the profits, and that she largely assisted in the actual conduct of the business, and appropriated the profits that were not required for the increase of plant and the household expenses, yet, the business being carried on by the husband, and all the facts and circumstances shewing that, the inference must nevertheless be that it was his business, and not hers, and that he had a proprietary interest therein. I do not think so. It is a question of fact and a question of intention. If the parties were expecting a case of this kind to arise, I think the fair presumption would be that they would probably prepare for it, have everything in black and white, to shew that the business was hers, and that the husband was paid a definite and fixed salary. The fact that this was not so, and that there were either no creditors or no pressing creditors during the whole period that the business was carried on,

leads rather to the opposite conclusion, that, as between themselves, perfect confidence existed, and the public had nothing to do with the question. If this was a case as between a creditor and the husband who had purchased goods for the business upon the faith of holding out that it was his business, different considerations would arise, but there is nothing of the kind here. It is a pure question of fact, and the findings by the trial Judge are founded upon ample evidence in favour of the defendants: see *Walker v. Brown*, 36 O.L.R. 287, 30 D.L.R. 204.

This appeal should, in my judgment, be dismissed with costs

Appeal allowed; HODGINS, J.A., and CLUTE, J., dissenting.

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Sale of Goods—Unfitness for Purpose of Purchaser—Knowledge of Purpose—Rejection of Part of Goods only—Misrepresentation by Vendor's Agent—Reliance upon Judgment of Agent—Implied Warranty or Condition of Fitness—Breach—Right to Reject Part—General Damages—Special Damage—Damages in Respect of Quality of Goods Retained.

The defendants, who were manufacturers of clothing which they shipped by express to customers in various parts of Canada, ordered from the plaintiffs 19,000 paper boxes for use in their (the defendants') business. The plaintiffs made and delivered to the defendants 8,500 boxes. The defendants used some of these, and then, finding they were not strong enough for their purpose, returned to the plaintiffs what remained on hand, except so many as the defendants thought they would need until supplied with more suitable boxes by another manufacturer—sending the plaintiffs a cheque for the price of the boxes used or retained. The plaintiffs refused to accept the cheque or to acknowledge the defendants' right to reject, and sued for the price of the 8,500 boxes delivered and for damages for breach of contract. The defendants denied that the boxes delivered were such as they were bound to accept, and alleged that they had suffered loss by reason of the plaintiffs' breach of contract to deliver boxes fit for the defendants' purpose. Before the defendants gave the order for the boxes they were visited by a salesman (S.) sent by the plaintiffs, to whom they described the purpose for which the boxes were needed. S. left with the defendants specimens of the plaintiffs' boxes, and assured the defendants that these boxes were suitable for their purpose. He also made a representation to the effect that the boxes were used by another clothier doing the same kind of business; this was not correct and was misleading. The defendants

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accepted S.'s assurance, and, relying upon his judgment, gave him the order. As soon as the defendants began to use the boxes, it became apparent that they were not fit for use as containers of clothes sent by express to distant places:—

Held, that, while S.'s misrepresentation was not fraudulent, it was a material representation inducing the contract, and S. was the man put forward by the plaintiffs to negotiate the contract; so that the defendants were entitled to repudiate, upon learning the facts; but this right to repudiate was a right to repudiate the contract as a whole—the defendants could not affirm as to part, as they did by retaining some of the goods, and repudiate as to the remainder.

(2) That, whether S. had or had not authority to warrant the boxes fit for the purpose intended was immaterial; through him the defendants made known to the manufacturer the purpose for which the boxes were to be used, and they relied upon the skill of the manufacturer to furnish boxes reasonably fit for that purpose; so that there was an implied condition that the goods should be fit for the purpose; and, that condition being broken, the defendants had the right to reject the goods.

(3) That the sale was not a "sale by sample;" the implied condition attaches upon the sale of an article like the one exhibited; so, even if the boxes delivered were as good as the ones exhibited, the defendants had the right to reject; in the case of the sale of a number of articles, each one of which must be of the kind and quality ordered, the purchaser is not bound to reject or retain all; and therefore the defendants were entitled to accept some, as they did, and to reject the others.

Molling and Co. v. Dean and Son Limited (1901), 18 Times L.R. 207, followed.

(4) That the defendants could not have general damages arising from the breach of the condition in respect of the goods rejected—such general damages are recoverable only where the property has passed; and there was no evidence of special damage in respect of the boxes returned.

(5) That the only damages recoverable by the defendants were such damages as, treating the stipulation as to quality as a warranty, they could prove that they had sustained by breach of that stipulation in respect of the boxes used or retained.

The judgment of the County Court of the County of York in favour of the plaintiffs for the recovery of a sum representing the value of the boxes used or retained, was affirmed, with a slight variation in the amount; subject to a set-off in favour of the defendants of the amount of such damages as they could prove (upon a reference at their own risk) that they had sustained by breach of the stipulation mentioned above (5)—LENNOX, J., dissenting as to this.

Per LENNOX, J.:—A litigant should not be allowed, after he is aware of all the facts, to adopt a contract in part and repudiate it in part.

AN appeal by the plaintiffs and a cross-appeal by the defendants from the judgment of one of the Judges of the County Court of the County of York, who tried the action without a jury, and found in favour of the plaintiffs, but for the recovery of \$105 only, and refused to award the defendants damages upon their counter-claim.

The following statement of the facts is taken from the judgment of ROSE, J.:—

The defendants, who are manufacturers of clothing which they ship by express to customers in various parts of Canada,

ordered from the plaintiffs 19,000 paper boxes for use in their business. The plaintiffs made and delivered to the defendants 8,500 boxes. The defendants used some of these, and then, finding they were not strong enough for the purpose for which they had ordered them, returned to the plaintiffs what remained on hand, except so many as the defendants thought they would need pending the delivery to them of boxes of a somewhat different type which they had ordered from another manufacturer, at the same time sending to the plaintiffs a cheque for the price, as they computed it, of the boxes used or retained. The plaintiffs refused to accept the cheque or to acknowledge the defendants' right to reject the boxes, and sued in the County Court for the price of the boxes delivered and for damages for breach of contract. The defendants, besides denying that the boxes delivered were such as they were bound to accept, alleged that they had suffered loss by reason of the plaintiffs' breach of contract to deliver boxes fit for the purpose for which the boxes in question were intended; and, although they did not put upon the record a formal counterclaim for such damages, they gave evidence in support of their allegation, and, at the trial, asked leave to amend so as formally to present their counterclaim. The leave was not expressly granted or refused, and the motion was renewed before us.

The learned trial Judge gave judgment in favour of the plaintiffs for \$105 and costs. The way in which this amount was arrived at does not appear; probably, the intention was to award the price of the boxes used or kept by the defendants, which, according to the plaintiffs' evidence, would be, at the contract rate, \$99.87.

The plaintiffs appeal, claiming that they have established their right to payment for all the boxes delivered and to damages for the defendants' refusal to accept the whole number ordered; and the defendants cross-appeal against the judgment for \$105, and against the refusal of the trial Judge to give them damages upon their counterclaim.

Before ordering the boxes from the plaintiffs, the defendants had been using boxes procured from another manufacturer. The price of these boxes was advanced, and the defendants asked the plaintiffs to quote prices for such boxes as they required. The plaintiffs sent a salesman, Skinner, to see the defendants. Skinner made more than one visit; the defendants told him that they

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required boxes of two sizes, the one to contain a suit of clothes and the other a pair of trousers, to be shipped by express to any part of Canada. Skinner left with the defendants specimens of the plaintiffs' boxes of the respective sizes, and assured them that these boxes were suitable for the purpose specified. He also told them that such boxes were being used for the same purpose by another clothier, whom he named, and who was known to the defendants to be carrying on a very large business of a character similar to their own. This last statement was not quite correct, in that the other clothier mentioned, some considerable time previously, had ceased to use boxes for shipment to distant places, and recently had ceased even to use them for shipment within Ontario. He was still using them, but only for delivery in Toronto.

The defendants were, at first, skeptical about the strength of the boxes, but finally, as the trial Judge finds, and, as I think, correctly finds, upon the evidence, they accepted Skinner's assurance, and, relying upon his judgment, gave him the order.

As soon as the defendants began to use the boxes, it became apparent that they were not fit for use as containers for clothes sent by express to distant places; many of them were broken in transit, and in some instances the clothes were damaged. The defendants, therefore, as has been mentioned, returned most of those that they had on hand and announced that they would not accept any more of those that had been ordered. After some negotiations, to which it is unnecessary to refer, this action was brought.

November 9, 1917. The appeal and cross-appeal were heard by MACLAREN, J.A., LENNOX, J., FERGUSON, J.A., and ROSE, J.

M. H. Ludwig, K.C., for the plaintiffs. Parol evidence cannot be adduced to prove any verbal warranty or condition as to the fitness of the boxes for a particular purpose, as the contract itself was in writing: *Tye v. Fynmore* (1813), 3 Camp. 462; *Goss v. Lord Nugent* (1833), 5 B. & Ad. 58, at p. 64; *Harnor v. Groves* (1855), 15 C.B. 667. At any rate the boxes would have been sufficient but for the changed conditions in express transportation owing to the war. Skinner had no authority to give a warranty. By retaining some of the boxes after discovering their unfitness, the defendants lost all right to reject the goods or to rescind the contract: 35 "Cyc.," pp. 140 to 143.

R. D. Moorhead, for the defendants. They should be relieved from the judgment for \$105, and should be allowed to set up their counterclaim and have judgment in their favour thereon. As to the plaintiffs' contentions on their appeal: in the first place, the contract is not in writing; the memorandum relied upon by the plaintiffs was simply for the guidance of the manufacturer. But, even if it were in writing, parol evidence may be given to prove a verbal warranty respecting a matter on which the written contract is wholly silent: *Edward Lloyd Limited v. Sturgeon Falls Pulp Co. Limited* (1901), 85 L.T.R. 162. The boxes rejected were inherently weak and not as represented. As to Skinner's authority, the defendants were justified in thinking that he had authority. At any rate, there was an implied warranty that the goods would be suitable; and, as they were not, there was the right to reject: *Jones v. Bright* (1829), 5 Bing. 533.

Ludwig, in reply, referred to *New London Credit Syndicate Limited v. Neale*, [1898] 2 Q.B. 487, on the question of the admission of oral evidence.

March 1, 1918. ROSE, J. (after setting out the facts as above):—Many points are made by the plaintiffs in their attack upon the judgment. First, it is said that the contract was in writing, and that parol evidence is inadmissible to add to that writing any term, such as a warranty or condition that the boxes would be fit for a particular purpose. This point, I think, need not be discussed; for, in my view, the contract is not in writing. What is pointed to as the contract is a memorandum made by Skinner and marked "O.K." and initialled by an officer of the defendants, shewing certain quantities, sizes, and prices of, and certain words to be printed upon, certain articles, not named in the memorandum, but which we know to be the boxes. There are also words indicating that the articles are to be taken within a certain time and are to be charged to the defendants. The memorandum is written upon the letter-paper of the defendants; the name of the plaintiffs does not appear. Looking at it, it is, to my mind, clear that it is merely a memorandum for the guidance of the manufacturer, and that it does not represent an attempt by the parties to put their agreement into writing.

Secondly, it is said that the boxes would have been sufficient

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for the purpose intended if the conditions of express traffic had remained as they were at the time the order was given; but that, owing to the congestion of railway business, much merchandise which was formerly shipped as freight is now shipped by express, with the result that the express cars are overcrowded and the packages are subjected to unusually hard treatment. The trial Judge thinks this *may* be true; but the evidence does not satisfy me that it *is* true; and I do not stop to consider what legal result would follow if the fact were established.

Thirdly, it is said that Skinner had no authority from the plaintiffs to make any representations or give any warranty; fourthly, that the sale was a sale by sample, and there is therefore no implied warranty or condition of fitness; and, finally, that, by electing to retain some of the boxes, after they had discovered the defect, the defendants lost any rights they might otherwise have had. These points will be considered together. Skinner's misrepresentation as to the use of the boxes by another dealer does not seem to have been fraudulent: it is not shewn that he knew that that other dealer, who was still buying the boxes, was using them only for local deliveries; but it was a material representation inducing the contract, and Skinner was the man put forward by the plaintiffs to negotiate the contract; so that the defendants were entitled to repudiate, upon learning the facts. They did set up the misrepresentation in their letter which accompanied the boxes returned to the plaintiffs. As at present advised, I think this right to repudiate because of the misrepresentation was a right to repudiate the contract as a whole; and that the defendants could not affirm as to part, as they did by retaining some of the goods, and repudiate as to the remainder. Therefore, I think they cannot rely upon the misrepresentation; and the inquiry seems to me to be narrowed down to a discussion of the effect of the breach of the alleged warranty or condition. Whether Skinner had or had not authority to warrant the boxes fit for the purpose intended seems to be immaterial. Through him the defendants made known to the manufacturer the purpose for which the boxes were to be used; and they relied upon the skill of the manufacturer to furnish boxes reasonably fit for that purpose; so that there was an implied condition that the goods should be fit for the purpose; and, that condition being broken, the defendants

had the right to reject the goods. This condition was implied because the case falls within the fourth rule in *Jones v. Just* (1868), L.R. 3 Q.B. 197, rather than within the third rule: see *Ontario Sewer Pipe Co. v. Macdonald* (1910), 2 O.W.N. 483; *Hopkins v. Jannison* (1914), 30 O.L.R. 305, 18 D.L.R. 88.

The fact that a specimen box was exhibited does not seem to make any difference: the sale was not a "sale by sample" properly so called. The implied condition attaches even upon the sale of a specific article; and must equally attach upon the sale of an article like the one exhibited. So that, even if the boxes delivered were as good as the ones exhibited, which, upon the evidence, is doubtful, the defendants had the right to reject, and it does not seem that in the case of the sale of a number of articles, each one of which must be of the kind and quality ordered, the purchaser is bound to reject or retain all: see *Molling and Co. v. Dean and Son Limited* (1901), 18 Times L.R. 217. Therefore, I think the defendants were entitled to accept some, as they did, and to reject the others. The fact that there was a breach of the condition in respect of those rejected does not support the claim of general damages: such general damages are recoverable only where the property has passed: *Frye v. Milligan* (1885), 10 O.R. 509; and there is no evidence of special damage in respect of the boxes returned. It is unnecessary, therefore, to consider whether, if special damage were proved to have resulted from the breach of the implied condition, it would be recoverable notwithstanding the return of the goods: see *New Hamburg Manufacturing Co. v. Webb* (1911), 23 O.L.R. 44.

If I am correct in this, the only damages recoverable by the defendants are such damages as, treating the stipulation as to quality as a warranty, they can prove they have sustained by the breach of that stipulation in respect of the boxes used or retained; and I would allow them to amend their pleadings and would give them at their own risk a reference back to ascertain such damages and set them off against the plaintiffs' claim.

The judgment in favour of the plaintiffs ought to be reduced to \$99.87, with costs in the County Court upon the appropriate scale; the plaintiffs' appeal, which is the main appeal, failing, the plaintiffs ought to pay the costs of it; there ought to be no costs specially taxed in respect of the cross-appeal, which did not materially add

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to the expense in this Court; and the costs of the reference back, if the defendants elect to take one, ought to be in the discretion of the County Court Judge.

MACLAREN and FERGUSON, JJ.A., agreed with ROSE, J.

LENNOX, J.:—I regret that I find myself unable to concur in the judgment of my learned brothers.

I am satisfied with the judgment of the learned Judge of the County Court, so far as it goes—if I varied it, it would be by allowing the plaintiffs' appeal.

I have frequently had occasion, in connection with other cases, to consider *Molling and Co. v. Dean and Son Limited*, 18 Times L.R. 217; and, although I may be occasionally bound by it, I have not been able to discover satisfactory grounds in law on which to allow a litigant, after he is aware of all the facts, to adopt a contract in part and repudiate it in part. In any event, I am, with sincere respect, of opinion that it has no application in this case. As the judgment of my brothers is final in this case, no good purpose would be served by pointing out why I entertain a contrary view.

Judgment below varied as stated by ROSE, J.;

LENNOX, J., *dissenting.*

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[APPELLATE DIVISION.]

March 1.

CRAWFORD V. BATHURST LAND AND DEVELOPMENT CO. LIMITED.

Company—Trustees and Directors—Promoters—Breaches of Trust—Sums Paid to Trustees out of Price Paid by Company to Promoter and Director for Land—Right of Shareholder to Compel Repayment to Company—Sum Paid by Officers of Company to Director as Commission upon Resale of Land—Right to Compel Repayment—Liability of Directors Authorising or Concerned in Improper Payment—By-laws of Shareholders Ratifying Payments—Fraud—Impairment of Capital—Prospectus Clauses of Companies Act, R.S.O. 1914, ch. 173, secs. 99 et seq.

The judgment of MASTEN, J., 37 O.L.R. 611, was affirmed by a Divisional Court of the Appellate Division.

Upon the question of the liability of two of the defendants, directors of the defendant company, to repay to the defendant company a commission found to have been improperly paid to the defendant D., also a director, the Court (composed of four Judges) was divided.

Upon that question, it was *held*, by MEREDITH, C.J.C.P., and LENNOX, J., that the defendant D. had no right to the commission because in fact he was not employed to sell the company's land; all the officers of the company who authorised the payment to D., and so those who in effect paid it, were liable to refund it or cause it to be refunded; and the defendants G. and B. were, as well as the other directors, parties to the improper payment.

But, *per* RIDDELL and ROSE, JJ., that the evidence did not shew that the directors ordered the payment; there was no formal resolution for payment of the commission, and the passing of a resolution could not be inferred from the mere fact that the directors ordered the distribution of the money that they were told would remain after the commission and the other outgoings were paid. There being no authority for the payment, the estate of D. was liable for its repayment to the company; the defendants F. and M., who signed the cheque, were also liable; but the other directors were not liable.

As to the sums paid to the defendants F. and D. for their services as promoters, by W., the vendor to the syndicate, out of the money which he received as the difference between the price at which he bought the land and that at which he sold to the syndicate, it was *held, per Curiam*, that these sums were secret profits obtained by those who were really trustees for the company, and thus liable to account to the company for what they had received.

Per MEREDITH, C.J.C.P., and LENNOX, J.:—The defendants F. and D. were not discharged from liability to account by a resolution of the company, passed at a meeting of its shareholders, purporting to ratify the payments; it was not in the interests of the company to discharge such a liability, and there was no power to give such relief against the will of any shareholder.

The provisions of the prospectus clauses of the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 99 *et seq.*, were applicable to the company.

The plaintiff had a right to enforce his interests in these matters in the name of the company, though all other shareholders should release theirs.

Per RIDDELL and ROSE, JJ.:—The by-laws passed by the shareholders, purporting to ratify all the payments for which the several defendants had been held liable, and to release all claims against those defendants, were invalid as being, in effect, an attempt, at a time when the company's capital was impaired, to make presents to the directors of the debts due by them to the company; and, in these circumstances, the plaintiff could maintain the action.

APPEALS by the defendants and cross-appeal by the plaintiff from the judgment of MASTEN, J., 37 O.L.R. 611.

December 3 and 4, 1917. The appeals and cross-appeal were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

I. F. Hellmuth, K.C., for the defendant Fullerton, appellant. The plaintiff cannot compel repayment by Fullerton of the money received by him out of the price paid by the company for the lands. There was disclosure to the company that Wallace received a profit of \$75 an acre on the sale of the lands to the syndicate. Wallace could do what he liked with this profit. By his acquiescence and laches, and by his general conduct as a shareholder and as a solicitor for the company, the plaintiff is precluded from maintaining this action. In any event, the acts complained of were *intra vires* of

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the company: *Merriam v. Kenderdine Realty Co. (No. 1)* (1915), 34 O.L.R. 556, 25 D.L.R. 369; *In re Cape Breton Co.* (1884), 26 Ch. D. 221; *Barry v. Stoney Point Canning Co.* (1917), 55 S.C.R. 51, 36 D.L.R. 326. On the question of non-disclosure, see *Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652; *Burland v. Earle*, [1902] A.C. 83, at p. 98; *Ladywell Mining Co. v. Brookes* (1887), 35 Ch. D. 400. As no fraud was committed on the complaining minority, the company alone is entitled to maintain this action: *In re Lady Forrest (Murchison) Gold Mine Limited*, [1901] 1 Ch. 582; *In re Innes & Co. Limited*, [1903] 1 Ch. 674, [1903] 2 Ch. 254; *In re George Newman v. Co.*, [1895] 1 Ch. 674. The learned trial Judge erred in holding that the shareholders had no power to ratify, confirm, and approve the expenditures complained of: *Bennett v. Havelock Electric Light Co.* (1911-12), 25 O.L.R. 200, 46 S.C.R. 640, 8 D.L.R. 954; *Baillie v. Oriental Telephone and Electric Co. Limited*, [1915] 1 Ch. 503. The majority shareholders did not go beyond the powers of the company: *Dominion Cotton Mills Co. Limited v. Amyot*, [1912] A.C. 546, 4 D.L.R. 306; *Foster v. Foster*, [1916] 1 Ch. 532; *British South Africa Co. v. De Beers Consolidated Mines Limited*, [1910] 1 Ch. 354; *Cook v. Deeks*, [1916] 1 A.C. 554, 27 D.L.R. 1. All the acts complained of by the plaintiff were approved of and ratified by the shareholders, and the plaintiff has no right of action in respect of them: *Normandy v. Ind Coope & Co. Limited*, [1908] 1 Ch. 84.

W. N. Tilley, K.C., and *D. Urquhart*, for the defendants Murray, Gibson, and Bryan, appellants. These appellants are directors who got nothing, but have been held liable for payment of the commission to Doran. They did not order the payment, and should not have been held liable. There is no formal resolution among the minutes for the payment: *Trusts and Guarantee Co. Limited v. Abbott Mitchell Iron and Steel Co. of Ontario Limited* (1902), 11 O.L.R. 403; *Young v. Naval Military and Civil Service Co-operative Society of South Africa Limited*, [1905] 1 K.B. 687. Murray signed the cheque, but the company ratified it: *Re Owen Sound Lumber Co.* (1917), 38 O.L.R. 414, 33 D.L.R. 487; *Re Monarch Bank of Canada* (1910), 22 O.L.R. 516.

H. J. Macdonald, for the executors of the deceased defendant Doran, appellants. The plaintiff knew of the services rendered by Doran. Doran was employed outside his capacity as a director, namely, as a land agent, and was entitled to be remunerated.

J. E. Lawson, for the defendant company.

A. C. McMaster and *J. H. Fraser*, for the plaintiff, respondent and cross-appellant. The moneys obtained by Fullerton and Doran were secret profits which they, being trustees, could not retain: *Palmer's Company Law*, pp. 107, 118, 122; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; *In re Leeds and Hanley Theatres of Varieties Limited*, [1902] 2 Ch. 809; *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339; *In re North Australian Territory Co.*, [1892] 1 Ch. 322; *Cockburn v. Newbridge Sanitary Steam Laundry Co. Limited*, [1915] 1 I.R. 237; *Mayor etc. of Salford v. Lever*, [1891] 1 Q.B. 168. Nor did the resolution of the company purporting to ratify the payment give them any right to it, as there was no power in the company to make such a gift against the will of any shareholder. As to the commission to Doran, there was no agreement made to pay him such a commission, nor was he employed to sell the land. There was no authority to pay this commission, and the attempt of the company at a special meeting to ratify it was fruitless. The defendants Gibson and Bryan were parties to the improper payment; and Murray signed the cheque. The plaintiff should have his costs as between solicitor and client out of the fund which he has rescued for the company. This is the subject of the cross-appeal. There is a right to appeal without leave as to costs out of a fund: *Angell v. Davis* (1839), 4 My. & Cr. 360. The English authorities are reviewed in *Trustees of Internal Improvement Fund v. Greenough* (1881), 105 U.S. 527. The Judicature Act preserves this right: R.S.O. 1914, ch. 56, sec. 74 (2). The plaintiff should get his costs on a solicitor and client basis out of the fund recovered; otherwise he would be in a worse position than other shareholders who would reap a benefit made available by his efforts and at his risk: *In re McRea* (1886), 32 Ch. D. 613; *Sutton v. Doggett* (1840), 3 Beav. 9; *Goldsmith v. Russell* (1855), 5 De G.M. & G. 547, at p. 556.

Hellmuth, Tilley, and *Macdonald* were heard in reply.

March 1. MEREDITH, C.J.C.P.:—At the trial of this action the plaintiff's claims were reduced to four items, involving three separate questions: here they were further reduced to three items, involving two separate questions, the plaintiff abandon-

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ing the fourth item and third question, upon which he had failed at the trial.*

The items now in question are: \$3,867.25 claimed from the defendant Fullerton; the like sum claimed from the estate of one Doran, deceased; and a further sum of \$8,121.22 claimed from the same estate. The one question covers the first two items: the third item involves another and altogether different question.

The first question is: whether the plaintiff can compel payment, to the defendant company, of the first two items, the amounts of which were received by the defendant Fullerton and Doran, respectively, out of the price paid by the company for the land in question.

And the second is, whether the plaintiff can compel repayment to the company of the amount of the third item, which was paid by the company, or its officers, to Doran, in his lifetime, as a commission upon a sale of the company's lands.

The material facts upon which these questions have to be determined are simple and really little, if at all, in controversy.

One Wallace and the defendants Fullerton and Doran were intimately connected by family, business, and friendship's ties. Wallace seems to have first conceived the idea of buying the land in question, for a company to be created, for the purpose of selling it to such company again at a profit: it was possible for him to secure the right to purchase it at a fixed price, and he did so; but that was a futile thing unless the company could be created to take, and to pay for, it: and he was quite powerless to carry out that part of the scheme: but that part of it the defendants Fullerton and Doran were capable of accomplishing, and did accomplish. The company was formed; and the shareholders paid in enough money upon their prospective stock to enable Wallace, Fullerton, and Doran to carry out, fully, the scheme. The price at which Wallace had contracted to purchase the land was \$725 an acre: the price at which the land was transferred over to the company was \$800 an acre; the number of acres was 156.

The profit thus made out of the scheme was \$11,601.75; but might have been any greater, or less, sum at which these three persons saw fit to put it. And this profit was divided, by Wallace,

*The plaintiff did not appeal or cross-appeal as to the item referred to, which was the payment of dividends out of capital.

equally among the three; and the first two items in the plaintiff's claim in this action are the amounts of the shares which Fullerton and Doran got. No claim is made against the estate of Wallace, who also is now dead.

Every payment which was made upon the land, with the exception of a "down-payment" of \$2,500, one-third of which was paid by Doran, and all of which was repaid out of the company's moneys, was paid directly by, or out of the money of, the company, to the sellers of the land; and the profits made by the three men came directly out of the company's money; the money, for all purposes, could not have come, and it was never intended, from the conception of the scheme, that it should come, in any other way.

Throughout, Fullerton and Doran purported to represent and act for the company to be formed, and Wallace as the vendor to them for the company. In the formal writings, evidencing the formal transaction, Fullerton was expressly made a trustee of the land for a "syndicate" which was to become the company; and, when the company was, at once, created and organised, Fullerton became its secretary-treasurer, and Doran its vice-president and general manager. The transition from syndicate to company was, in form, brought about by a resolution, at the company's first meeting, moved by Doran and carried unanimously, "that the syndicate should form itself into the said company."

From the testimony of the defendant Fullerton, it seems that he had not deemed himself legally entitled to demand any part of the profit made out of the scheme, but there can be no doubt that he and Doran expected to get, and deemed themselves entitled, apart from any legal right, to a share of it, and, I have no doubt, to share and share alike in it, as in the end they did. Doran in his testimony admitted that he expected to get a share of the profit; and the defendant Fullerton in his testimony put his position, as to the amount which he should have, thus: "I said to him"—that is, to Wallace—"the amount is entirely for you, but I have got in at least half the subscriptions, and it is owing to my efforts this matter has gone through so well for you as it has . . ."

The trial Judge found, and the evidence well supports that finding, that the receipt of these profits, so obtained, was not dis-

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closed to the company, or indeed to the syndicate; and, being secret profits obtained by those who were really trustees, and self-appointed trustees, for the company, which was not only then substantially in existence, but had, as I have said, provided all the money required to carry out the scheme of the three, including payment of the profits thus divided among them, and without which company, so supplying the money, there could not have been any profits to be divided, how was it possible for these persons to resist a claim upon them by the company to account for and pay over to them these profits? The company, and its supply of the money, was the essence of the scheme from its inception.

It was contended that the money paid to Wallace was his, and that he could do with it as he pleased. We are not in this action concerned with the first part of this contention. The second is plainly erroneous, meaning, as it did, that the company had no concern in the transaction. All profits out of the transaction were the profits of the company, not those of servants of the company; and, in the circumstances of this case, it can make no difference whether the parties to the scheme thought, or did not think, that those who were paid them had any legal claim upon him who paid such profits; or at what point of time the payments were made. The money received was a secret profit which the servant could not retain against the master's will.

Nor can I perceive any substantial difference, as to liability, between the case of Doran and that of Fullerton; as a matter of arrangement the latter was formally made the trustee through whose name the transaction should, in part, be carried out, and rights of all parties to some extent safeguarded. The mere fact that Fullerton was the one who thus acted does not at all alter the actual position of the others. Any of the others might just as well have been selected. Doran was a party to the whole scheme from its inception, and, as it seems to me, is in the same position as if he, instead of Fullerton, had been assigned to the position of formal trustee for the purposes I have mentioned.

It is, therefore, not needful for the plaintiff to rely upon the provisions of the prospectus clauses of the Ontario Companies Act (secs. 99 *et seq.*, R.S.O. 1914, ch. 178) to sustain the judgment appealed against, in this respect; but, if it were, I could find no good reason for excluding this company from their salutary require-

ments: the case seems to me to be one entirely within the mischief intended to be prevented by that remedial legislation. The company was not in any sense a close corporation. Shareholders, wherever they were thought to be procurable, were sought; and there was no restriction upon their rights to transfer their shares to any one anywhere. A liberal interpretation of the words "offer to the public" is imposed upon us by legislation, as well as by the character of the legislation in question. And, upon the other ground, surely these clauses are applicable. The shares of the company were shares which were to be dealt with in Ontario. The company dealt with them; and the defendant Fullerton dealt with them, as others also did: and so the company is doubly brought within this legislation. The words of sub-sec. 2 of sec. 99 of the Companies Act are very wide, and assuredly embrace this company.

The next question is: whether Fullerton and Doran were discharged from liability, to account for these profits, by the resolution of the company, passed at a meeting of its shareholders, in these words:—

"That the company renounces all claims against the said Doran and Fullerton in respect of the moneys so paid to them, and that the retention by the said Doran and Fullerton be and the same is hereby approved and confirmed, and that the whole transaction between Wallace, Doran, Fullerton, and the company, be and the same is hereby confirmed, approved, and ratified."

This action of the shareholders, if effectual, was substantially a gift by the company to Fullerton and Doran of these secret profits, a gift made at a meeting called in their interests, whilst the trial of this action was pending and for the purpose of defeating this action, and a meeting almost entirely composed of shareholders who were relatives and friends of these two then defendants, and who were summoned, and came, to the meeting for the purpose of relieving them from liability.

But there was no power to give such relief against the will of any shareholder, if otherwise it could be said to have been given fairly. In no sense could it have been deemed in the interests of the company to discharge such a liability, or make such a gift; it could be given only in the interests, and for the personal benefit, of these two individuals; and to be an encouragement to that which the law deems a breach of trust, whatever may be the views of

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business men upon the subject in regard to some particular cases: so that, if the company were a going concern, the gift could hardly be upheld: see *Hampson v. Price's Patent Candle Co.* (1876), 24 W.R. 754; and *Taunton v. Royal Insurance Co.* (1864), 2 H. & M. 135; and the less so when it was substantially, and practically, though not by legal methods, being wound up, and was so far wound up that a part of the capital of the company had been returned to the shareholders: see *Hutton v. West Cork R.W. Co.* (1883), 23 Ch. D. 654; *Cyclists' Touring Club v. Hopkinson*, [1910] 1 Ch. 179; and *In re George Newman & Co.*, [1895] 1 Ch. 674. I do not put it upon want of power, but upon impropriety of the act—stated in legal phraseology, fraud.

The adjudication appealed against, regarding these two items, was, in my opinion, right: and this appeal as to them, in my opinion, should be dismissed.

The third item stands upon a different footing. The amount of it was paid to Doran, as a land agent's commission, upon the resale of the land in question, which was made by the company at a profit; a sale made while Doran was a director of the company and its general manager.

The trial Judge was unable to find that there was any agreement to pay Doran any commission, or that he was employed by the company to sell the land; and the evidence, as I find, fails to establish any such employment or any agreement to pay, expressed or implied.

Doran had recently become a land agent; and his story, at the trial, was: that in some informal way he had been employed to sell the land, and so employed on the understanding that he was to have a land agent's commission of five per cent., upon the sale-price, if he effected a sale; and that the sale, which the company eventually made, was effected by him. But there is no unprejudiced corroboration of the story of his employment, though such corroboration was easily obtainable from those who took part in his informal employment, if they could have proved it; and the writings are altogether against it. The minutes of the meetings at which it is said to have taken place, though they purport to set out all its proceedings, and although they relate to the land in other respects, contain nothing that supports the story in any way; and some of the records of meetings of the company shew that the remuneration

of directors was to be \$10 for each meeting attended; nothing more than that is anywhere provided for.

It seems that an offer, somewhat lower than that eventually accepted, had been made for the land, and that some of the directors were in favour of accepting it, but that Doran opposed them, expressing the opinion that more could be had from the persons making the offer; and more was obtained eventually. But in all that was done there was no more than a director's duty performed. I find no evidence of anything done in the capacity of a land agent merely, anything done that might not fairly be expected of a director who might have had some skill, and some experience, though very little, as the man had been but a short time a land agent, in buying and selling land. No advertisement in his lists of lands for sale by him, nor any seeking of other purchasers, seems to have been proved; his dealings with a person who went to England in respect of another transaction are left in a very hazy state in evidence, so hazy a state as to be insufficient to support a legal claim for any amount, not to speak of over \$8,000. The argument of Doran, in the witness-box, that he should be paid a commission of over \$8,000 because, as he asserts, he procured an advance of less than \$8,000 in the price of the lands, seems to one, as his whole claim also does, less even than a lame one.

It would be very dangerous to support, upon such flimsy evidence, a claim such as this, by a person holding a position in a company such as Doran held in this company, and whose duty it was, consequently, to do all that, by virtue of such position, he should, to effect a sale. And, by the way, I may add that the danger of relying on parol evidence to support a claim for a land agent's commission, in any case, has become so apparent that, somewhat recently, legislation has been passed requiring evidence in writing of it.

But as to this item, as well as in regard to the other two, an attempt was made to ratify, at a shareholders' meeting, the payment of it. It was the same meeting at which the attempt was made to discharge Doran and Fullerton from the claims against them upon the first two items. In regard to the calling to the meeting, what took place at it, and the ineffectual character of it,

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this item and the others are, for the same reasons, in the same position: what was done was ineffectual as to this item, as it was as to the other two, and for the like reasons.

It is not necessary to consider what would have been the result if there had been an expressed or implied employment of this director, and general manager, of the company, to sell its land: the alleged right to the commission fails, as far as I am concerned, because in fact no employment was proved.

And those officers of the company who authorised the payment of the sum in question to Doran, and so those who in effect paid it, are liable to refund it or cause it to be refunded. It could not have been paid out but for such authorisation, and the finding of the trial Judge as to those who are so liable seems to me to be well supported by the evidence.

The result is that the appeal, which embraces these three items, should, in my opinion, be dismissed.

The plaintiff has a right to enforce his interests in these matters in the name of the company, though all other shareholders may, and though they should, release theirs.

Since this opinion was written, soon after the argument of this appeal, two of my learned brothers have become unable to agree to it in so far as it affects the defendants Gibson and Bryan, thinking that the evidence is not sufficient to connect them with the improper payment to Doran of the \$8,121.22. If we were bound to look at the minutes of meetings only for evidence of what these directors did, I should yet find no great difficulty in agreeing with the trial Judge that it is proved that these defendants were parties to that improper payment. Minutes of meetings are not to be looked upon as if they were legal documents "settled" by learned counsel: rather the eye of the business man, or as much of it as remains in the Judge, is to be applied to it; and I have no sort of doubt that the man of business would smile at my suggestion that the minutes in question might not be those of a directors' meeting, and would say to me, "What else can they be?" And I am bound to confess that my inclination would be to say "Nothing." And then he would say, "Why do they not shew a direction by the directors to pay this sum?" But there is much evidence besides; these defendants do not deny it in their pleading; on the contrary, they adopt the Doran defence that it

was a proper and lawful payment; and they did not at the trial go into the box and say, "We took no part in that payment;" on the contrary, their counsel contended that it was a proper and lawful payment, and in their notice of this appeal the same thing is contended; and the probabilities are, if not the presumption is, that the payment was, with the other payments, duly authorised at this directors' meeting. Otherwise we must assume, contrary to the fact and with extreme unfairness to the defendants Murray and Fullerton, that they were guilty of the obvious and grave wrong of signing the cheque and making this large payment without any kind of authorisation. Besides all this, they joined with Doran and the others at the ratification meeting, held for the purpose of defeating this action, and have completely, by their conduct throughout, cut the grounds of this defence from under their feet, if there ever were any such grounds.

LENNOX, J., agreed with the Chief Justice.

RIDDELL, J.:—I agree that the appeal should be dismissed in respect of Fullerton and Doran and allowed in respect of the other directors.

The facts are not obscure and the law is not in doubt; and I can see no good end to be attained by adding remarks of my own, adopting, as I do, the judgment of my brother Rose.

ROSE, J.:—I agree that Mr. Fullerton and the Doran estate, respectively, must account for the payments made to Mr. Fullerton and Mr. Doran by Wallace out of the profit made by him upon his sale to Mr. Fullerton as trustee.

Mr. Fullerton's statement, which appears to accord with the documents, including the contracts, the conveyances, and the minutes of the meetings, makes his position quite plain. Wallace informed him that he was buying land at \$725 an acre or less, and asked him to act as trustee for a syndicate which Wallace desired to form to take over the land at \$800 an acre and to go into the syndicate himself and help to bring others in. Mr. Fullerton at once consented to act as trustee, but declined to promise to join the syndicate or to ask others to join, until such time as he had examined the property and satisfied himself as to its value. Then

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Mr. Fullerton and Mr. Doran were taken to see the property, and, following the inspection, Mr. Fullerton spent some time in satisfying himself as to the prospective value of the land, and finally agreed to join the syndicate and to ask others to join. Next, an agreement was signed between Wallace as vendor and Fullerton as trustee, by which the vendor agreed to sell and the trustee agreed to purchase the land at the price of \$800 an acre, in all \$123,752, payable \$2,500 down, \$44,201.75 in ten days, and the balance by the assumption of mortgages, and it was "understood and agreed" that the purchaser was "a trustee for a certain syndicate formed to purchase the said property;" and the vendor agreed to accept the liabilities of the syndicate and the members thereof, in lieu of any liability of the purchaser, and to release the purchaser from any personal liability. Contemporaneously, there was prepared a syndicate agreement between Wallace of the first part, Fullerton "as trustee" of the second part, and the subscribers of the third part. By it the parties agreed that on entering into the contract of purchase Fullerton "shall be deemed to have been acting as trustee for and on behalf of the syndicate and the syndicate shall forthwith pay him the deposit and shall indemnify him against all liabilities under the said contract." It was further agreed that each subscriber should be entitled to shares in a company to be formed, proportionate to the number of shares held by him in the syndicate; and that the trustee should, on request, convey the land to the company.

Matters then proceeded as was intended. Mr. Fullerton busied himself in getting persons to join the syndicate; the money for making the cash payments to Wallace was provided by the syndicate; the land was conveyed to Wallace by the persons from whom he had bought it; and Wallace conveyed it to Fullerton. The cash paid to Wallace exceeded by \$11,601.75 the cash which Wallace had had to pay to those from whom he bought. Immediately after the money had been paid to Wallace and the conveyance to Fullerton had been executed, Wallace came to Mr. Fullerton and said: "I have come in to see what you thought you ought to get out of this." Mr. Fullerton says that the statement "rather startled" him; and he explained to Wallace that there was no understanding that he should have anything: that he was not entitled to anything. Wallace then said, "How

would \$300 strike you?" And Fullerton said: "The amount is entirely for you, but I have got in at least half of the subscriptions, and it is owing to my efforts this matter has gone through for you as well as it has; if under these circumstances you feel disposed to give me a bonus or gratuity I will accept it, but the amount of that or whether you give it or not is entirely for you to say." The same afternoon or the next morning, Wallace handed Mr. Fullerton a cheque, and went away. Mr. Fullerton "looked at it and saw it was for one-third" of the \$11,601.75.

Mr. Fullerton next obtained letters patent incorporating the company, and had these with him at a meeting of the syndicate held on the 7th April, 1913. No information was given to the meeting about the payment by Wallace to Fullerton, or about a similar payment to Doran. The letters patent were produced, and it was resolved "that the syndicate should form itself into the said company and that the members of the syndicate should take stock in the said company in proportion to the amount of their shares in the syndicate." Meetings of the provisional directors and of the shareholders were then held, the shareholders present or represented being the members of the syndicate present or represented at the meeting of the syndicate. Directors were elected, Messrs. Fullerton and Doran being of the number; and a meeting of directors was held, attended by those two and two others. At that meeting a by-law was passed "that the agreement made between Mr. Wallace and Mr. Fullerton be adopted as the agreement made on behalf of this company, and that the directors be instructed to accept and execute a deed from Mr. Fullerton to the company of the said property, containing a covenant by the company to indemnify Mr. Fullerton from any contracts or covenants which he may have entered into as trustee of the company." By a deed, dated before, but registered after, the last-mentioned meeting, Mr. Fullerton conveyed the land to the company.

Upon this statement of facts, I do not see how it is possible to hold that Mr. Fullerton has any right, as against the company, to retain the \$3,867.25. He never had any beneficial interest in the land; and, granting that there is a difficulty in holding that at the time when he received the money he was trustee for the company, which was not then formed (see *In re Leeds and Hanley Theatres*

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of *Varieties Limited*, [1902] 2 Ch. 809, at p. 822), he certainly was, at that time, trustee for the syndicate; and, upon the formation of the company, he became trustee for the company. The money that he paid to Wallace for the land was the money put up by the members of the syndicate, and was treated by the company as payment for the shares allotted to those members. The company, when it adopted as its own the contract between Wallace and Fullerton, and agreed to accept a conveyance from and to indemnify its trustee, was not aware that the trustee had got back some of the money which he had disbursed. How can the trustee say that the money that had thus come to him was not held by him upon exactly the same trust as the trust upon which he held the land, i.e., a trust to hand it over to the company?

Mr. Doran's position, formally anyway, was a little different from Mr. Fullerton's. The land was never in his name, and in that sense he was not a trustee; and to that extent the case against him is weaker than the case against Mr. Fullerton. But, as found by Mr. Justice Masten, he became interested in the matter even before Mr. Fullerton did; he advanced to Wallace a portion of the money which Wallace had to pay as a deposit upon his purchase, and from that time he was active in the formation of the syndicate and of the company; he was with Mr. Fullerton when Mr. Fullerton first went to see the property; he did as much as Fullerton did in procuring subscriptions to the syndicate agreement; he was, in short, a promoter, and subject to all the disabilities attaching to that position. There seems to be strong reason for assuming, as Mr. Justice Masten does, that when Doran put up one-third of Wallace's deposit, he expected to receive some part of Wallace's profits: certainly, he admits that he expected Wallace would pay him for his work; but, even if the payment to him by Wallace can be looked upon as merely a gratuity, it seems to me that he must account for it. It is true that in most of the cases in which a promoter has been held liable to account for secret profits there had been something more than a voluntary payment to him by the vendor of property to the company; in some of the cases there had been an antecedent bargain between the vendor and the promoter, and in others the promoter had been party to a scheme by which the price to be paid by the company had been enhanced for the purpose of providing the fund out of which the promoter's

profit was to come. But it does not appear to me that such antecedent agreement or enhancement of price, while it has been present and has been referred to in the judgments, is something that must be proved in order that the promoter may be liable. His fiduciary position is recognised even at a time when he is not strictly a trustee: it is "clearly settled that persons who get up and form a company have duties towards it before it comes into existence:" *Emma Silver Mining Co. v. Lewis* (1897), 4 C.P.D. 396, at p. 407. Grant that, at the time when Doran received the money, he had "duties towards" the company, and that Wallace expected him to see that the company, when it came into existence, should ratify the agreement between Wallace and Fullerton, and should become responsible for the later payments which Wallace had contracted to make, and it seems impossible to avoid the conclusion reached by Mr. Justice Masten that Doran was under obligation to account for the payment made to him by the vendor of the property: see *Bagnall v. Carlton* (1877), 6 Ch. D. 371, at p. 384. So that, even if Doran was a promoter only, and not a promoter and a trustee, as Mr. Fullerton was, I think his liability is established.

The claim in respect of the sum of \$8,121.22 paid to Mr. Doran for effecting a sale of the company's lands remains to be considered. Mr. Doran swore, and Mr. Fullerton's evidence seems to support his statement, that it was understood amongst the directors that he should not be given a regular salary for acting as vice-president and general manager, but should have the opportunity of finding a purchaser for the land, and, if he succeeded, should be paid the usual land agent's commission, and should accept that as his "recompense" for performing the duties of his office.

At a meeting of the shareholders, he was instructed, informally, to endeavour to find a purchaser. He did make a sale, and he managed to induce the purchasers to add to the price first offered by them, which price some, at least, of the shareholders and directors were in favour of accepting, a sum practically equivalent to the amount of the commission. The company, therefore, ought to have been well content to pay the commission; and, apparently, all the members who knew about the matter were content. It was paid; and the question is, whether there was legal authority for paying it.

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At a meeting, which was held on the 29th May, 1914, and which seems to have been a directors' meeting, although the minutes call it a meeting of the company, the secretary-treasurer is reported to have put in a statement of liabilities shewing the solicitors' charges in connection with the sale, a commission to Doran of \$8,121.22, small sums for fees of the several directors, and a small salary to the secretary-treasurer. The statement ended with the following memorandum:—

"The amount at present in the bank is \$45,014.48. The disbursements as above are \$8,829.22, which will enable us to pay a dividend of 57 per cent. and leave the balance in the bank of \$161.76 to the credit of the company."

Resolutions were passed that the directors be paid \$10 per meeting for meetings attended by them; that the secretary be allowed the sum mentioned in the statement as owing to him; and that a dividend of 57 per cent. be declared and be paid to the shareholders forthwith. On the same day, cheques were issued for the commission and for the dividend.

There was no resolution of any kind referring to the commission or to the solicitors' charges; but the directors present at the meeting have been held liable in respect of the commission. Now, the company's general by-law number 6, passed by the directors and duly confirmed by the shareholders, enacts that: "The directors, themselves, shall have power to fix their remuneration either as directors or as officers of the company, and also the salaries or remuneration to be paid to all salaried officers of the company, and to vary the same when it may be expedient to do so;" and it is argued that the directors did order the payment of the commission and did so in the exercise of the power conferred upon them by the by-law; and that no further confirmation by the shareholders was necessary. If the directors had in fact ordered the payment, it would be necessary to consider whether the general by-law relates to payments such as the one in question; but I cannot find evidence supporting Mr. Justice Masten's assumption that they did order it. It seems to me that the only proper basis for a decision as to what the directors did or did not do is what is set out in the minutes; and that, there being no formal resolution for payment of the commission, the passing of such a resolution cannot be inferred from the mere fact that the directors

ordered the distribution of the money that they were told would remain after the commission and the other outgoings were paid. Therefore, I reach the conclusion that there was no authority for the payment; that the Doran estate is liable; that Messrs. Fullerton and Murray, who signed the cheque, are also liable; but that the other directors are not liable.

So far I have discussed the case without reference to the by-laws passed by the shareholders, purporting to ratify all the payments for which the several defendants have been held liable, and to release all claims against those defendants. As to these by-laws, and as to the argument that the action is not maintainable except by the company as plaintiff, it is unnecessary to say more than that I agree with Mr. Justice Masten that the by-laws were invalid as being, in effect, an attempt, at a time when the company's capital was impaired, to make presents to the directors of the debts due by them to the company, and that the authorities support the right of the plaintiff, under these circumstances, to maintain the action.

Except as to the liability of the directors, other than Messrs. Fullerton and Murray, I would dismiss the appeal.

Appeal dismissed; RIDDELL and ROSE, JJ., dissenting on one point.

[APPELLATE DIVISION.]

COOK v. HINDS.

Company—Directors—Services as Managers—Salaries—By-law—Approval of Majority of Shareholders—Rights of Minority—Duties of Directors as Servants or Agents of Company—Contract for Payment—Contracting Company—Destruction of Future Prospects—Directors Taking Contracts for themselves—Unfaithfulness—Inseparable Duties—Fraud—Oppression—Return of Sums Paid as Salaries—Invalidity of By-law—Gratuities.

The capital stock of a contracting company was \$200,000, divided into 2,000 shares; the plaintiff owned 500 shares, the defendants H. and D. each 500 shares, and the third defendant and his wife 500 shares between them; and the plaintiff and defendants were the directors. The active management of the affairs of the company, the procuring of railway construction contracts and the carrying out of the work thereunder, was in the hands of the defendants H. and D.; and large profits accrued from the operations of the company, begun in 1905. In 1909, the defendants H. and D. became dissatisfied, and informed the plaintiff of their complaint, viz., that, while they did all the work and earned all the profits, the profits were shared by

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the plaintiff. At a meeting of the directors, early in January, 1910, at which the plaintiff was present, "it was decided," as the minutes read, "that the officers actively engaged in the management of the company should receive a salary to be settled on hereafter, this salary to date from May 1st, 1909." Nothing was done (at any rate for some years) in pursuance of this decision; the work went on as before until, in July or August, 1911, the defendants H. and D. determined to take such future contracts as they could obtain for their own benefit and not for the company. This determination was not announced to the plaintiff; but, in December, 1911, H. and D. intimated to the plaintiff that there must be a severance; and, in March or April, 1912, the L.S. contract was taken by H. and D. for themselves only; and they then notified the plaintiff of their intention to take all future contracts in their own names and for their own benefit. In *Cook v. Deeks*, [1916] 1 A.C. 554, it was declared by the Judicial Committee of the Privy Council, on the 29th February, 1916, that H. and D. were trustees for the company of the profits obtained from the L.S. contract. On the 25th March, 1916, a by-law was passed by the directors of the company (in the face of the opposition of the plaintiff) authorising the payment out of the funds of the company of salaries to H. and D., at the rate of \$25,000 a year each, for the period commencing on the 1st May, 1909, and ending on the 23rd February, 1912; this by-law was confirmed at a shareholders' meeting held on the 10th April, 1916, all the shareholders, except the plaintiff, being present; and the sum of \$70,461.43 was paid to H. and a like sum to D.:-

Held (MEREDITH, C.J.C.P., dissenting), that the by-law was ineffective, and the amounts paid to H. and D. should be repaid to the company.

Cook v. Deeks, *supra*, explained and applied.

Judgment of MASTEN, J., reversed.

Per RIDDELL and ROSE, JJ.:—It was the duty of the defendants H. and D., as servants or agents of the company, to carry on the business of the company so as to attract further business and not to put the company out of business. Where the agent is to be paid for several inseparable duties, unfaithfulness, even without fraud, in the performance of any of these duties will disentitle him to all remuneration. These defendants were not faithful to the company, their duties were not severable, and they were not entitled to any remuneration from the company: *Nitedals Taendstikfabrik v. Bruster*, [1906] 2 Ch. 671; *Palmer v. Goodwin* (1862), 13 Ir. Ch. R. 171.

Per LENNOX, J.:—The powers of the directors were not exercised in good faith; the defendants H. and D. were not fairly entitled to the sums of money voted to them; the by-law of 1916 was not passed in the honest exercise of the discretionary powers of the directors; what was done was dishonest and fraudulent, oppressive, and unfair to the plaintiff, a minority shareholder.

Per ROSE, J.:—If the by-law of 1916 had not been passed, H. and D. would not have had any enforceable claim against the company for salary for the period mentioned in that by-law. What was done in January, 1910, did not create a right to enforce payment. A by-law or resolution for the payment of directors is invalid and cannot be acted upon until it is confirmed by the shareholders; apart from that, H. and D. had no right to vote at a directors' meeting in respect of the proposed arrangement that they should be employed by the company; and they never became "employees." The Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 89. The resolution of January, 1910, being invalid, could not be treated as evidencing a contract that the officers "actively engaged in the management of the company should receive a salary;" and, in the absence of such a contract, there could not be a claim: *Re Bolt and Iron Co., Livingstone's Case* (1887-88), 14 O.R. 211, 16 A.R. 397. This being the legal position before the passing of the by-law of 1916, the payments authorised by that by-law were merely gratuities. The power of a company to grant gratuities to its directors may exist as incidental to the carrying on of the business of the company, but it is only as so incidental that it can be exercised against the will of a minority of the shareholders: *Hutton v. West Cork R.W. Co.* (1883), 23 Ch.D. 654. The by-law of 1916 was not passed as incidental to the carrying on of the com-

pany's business; the business was over; nothing remained to be done but to take the accounts and distribute the assets; and no benefit could accrue to the company from the making of the payments.

Per MEREDITH, C.J.C.P.:—

- (1) The defendants H. and D. had a good cause of action against the company, under the expressed undertaking of 1910, for more than the amount which they claimed.
- (2) They had a lawful right to the money in question under the action of the company in 1916.
- (3) In taking the L.S. contract in April, 1912, they believed they were doing no more than they had a right to do.
- (4) That contract was entirely separate from those out of which their right to remuneration arose.
- (5) At latest, at the end of each year a cause of action arose for the salaries these defendants were to be paid; and no misconduct after that could displace it.
- (6) The company having abstained from dismissing these defendants from office and taking over the work itself, and having claimed and had the benefit of the L.S. contract as fully as if it had been performed for the company by these defendants as its servants, it was inequitable to treat them as discharged servants disentitled to their wages; and the Court had no power to impose a penalty, except by way of exemplary damages; otherwise the true measure of damages was the measure of the plaintiff's actual loss: *Hamilton Gas and Light Co. and United Gas and Fuel Co. v. Gest* (1916), 37 O.L.R. 132.
- (7) Ordinarily all that is honestly owing to a servant, honest or dishonest, should be allowed to him on his accounting for and paying all lawful rights and claims of his master: *Tyrrell v. Bank of London* (1862), 10 H.L.C. 26; *Salomons v. Pender* (1865), 3 H. & C. 639.
- (8) The case was one of master and servant, or of company and executive officer; and, if it were not—if the payments were only for directors' fees—these defendants were entitled to be paid the salaries in question, because of the promise of every shareholder of the company, in 1910, to pay them, reaffirmed at the shareholders' meeting in 1916.
- (9) The actions of the shareholders in 1910 and 1916 were *intra vires* of the company; neither was fraudulent, and so both were binding, though either would be enough: *Dominion Cotton Mills Co. Limited v. Amyot*, [1912] A.C. 546.

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ACTION by A. B. Cook against Thomas R. Hinds, George S. Deeks, George M. Deeks, and the Toronto Construction Company Limited, for a declaration that the sum of \$70,461.43 paid out of the funds of the defendant company to the defendant George S. Deeks and a like sum paid to the defendant Hinds for the services of each in managing and conducting the business and work of the company, being at the rate for each of \$25,000 per annum for the period from the 1st May, 1909, to the 23rd February, 1912, were improperly paid, and for repayment thereof to the company; and also for a declaration that certain costs incurred by the defendants in a former action, *Cook v. Deeks* (1915), 33 O.L.R. 209, 21 D.L.R. 497, [1916] 1 A.C. 554, 27 D.L.R. 1, were improperly paid out of the funds of the company, and for repayment thereof to the company.

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May 28, 29, and 30, 1917. The action was tried by MASTEN, J., without a jury, at Toronto.

Wallace Nesbitt, K.C., and *A. M. Stewart*, for the plaintiff.

R. McKay, K.C., for the defendants.

August 4, 1917. MASTEN, J.:—The Toronto Construction Company Limited is a joint stock company incorporated under the Ontario Companies Act, and carried on operations as a contractor for the construction of public works, principally railways. The plaintiff and the individual defendants are all shareholders and directors in the company. The defendant George S. Deeks is its president, the defendant Hinds is secretary, and the plaintiff is the general manager. Throughout the period to which this action relates, the defendants George S. Deeks and Hinds superintended and managed all the business and work of the company in the office and on the ground, devoting practically their whole time to its affairs. The plaintiff and the defendant George M. Deeks attended meetings of the directors and shareholders, but otherwise, so far as appears, took no active part in the conduct of its affairs, during the period in question.

By resolution passed by the directors on the 25th March, 1916, and subsequently confirmed by the shareholders, George S. Deeks and Hinds were each awarded the sum of \$70,461.43 for their services in managing and conducting the business and work of the company, being at the rate of \$25,000 per annum for the period from the 1st May, 1909, till the 23rd February, 1912.

The plaintiff objected to this allowance; and, being unable to sue in the name of the company, brings this proceeding to reverse the company's action. He also questions the right of the defendant company to pay on behalf of the individual defendants certain costs taxed by the plaintiff or incurred by the defendants in a former litigation brought by the present plaintiff as plaintiff against the present defendants and the Dominion Construction Company as defendants.

The defendant company was organised in the year 1905. Its capital is \$200,000, divided into 2,000 shares of \$100 each, all fully paid-up. At the period in question the plaintiff and the defendants Hinds and G. M. Deeks held each 500 shares; George S. Deeks held 499 shares, and his wife, Helen E. Deeks, held one share.

The plaintiff and the individual defendants began operating as joint adventurers in 1905. The defendant company covered only one branch or phase of their activities, which were carried on in the Western States as well as in Canada. The plaintiff was associated with the original organisation of the company, and with its work in Canada in the year 1905, but left Canada for Montana in 1906, and after that time never engaged actively in the work of the company, though he was engaged in part on certain contracts, in which the other co-adventurers shared, down to some time in the year 1908. Since 1908 the plaintiff has not been engaged in any actual work on behalf of his associates, and since 1907 he has been undertaking and carrying out on his own behalf contracts in the States.

Deeks and Hinds say that more work of a profitable character could have been secured by the company in Canada if Cook would have come over and managed it, but that he refused to do so, and so the work could not be undertaken, as Deeks and Hinds were fully occupied with the other contracts then current. Cook says he was never asked to do this, and that he was always ready and willing to do anything he was called on for. I prefer on this point the evidence of Deeks and Hinds.

During the earlier period, and down to May, 1909, none of the parties received any salary or remuneration either as directors, officers, or employees. All shared equally in the profits of the different ventures. But, when Cook ceased work and began devoting all his time to his own affairs, George S. Deeks and Hinds became dissatisfied, on these as well as on other grounds (see exhibit 9), and at a meeting of all the directors held on the 10th January, 1910, they expressed to Cook their dissatisfaction with the existing situation. Cook at once suggested that the difficulty respecting remuneration be adjusted by the allowance of a salary to George S. Deeks and Hinds. According to the evidence of the defendants this was rejected as a permanent solution of the difficulty, but was accepted by them as a temporary *modus operandi*. They say in fact that they had come to the meeting prepared to make such a claim. Eventually a resolution respecting salary was proposed and passed. The minutes of the meeting are as follows:—

“Minutes of a meeting of the directors of Toronto Construction Company Limited, held at the head office of the company,

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Norwich Union Building, Toronto, on the 10th day of January, 1910, at 5 p.m.

"Present:

"George S. Deeks,
"A. B. Cook,
"T. R. Hinds,
"George M. Deeks.

"The president in the chair.

"Meeting called to order.

"The meeting proceeded to the election of officers, with the following result:—

"President,	George S. Deeks.
"General manager,	A. B. Cook.
"Sec'y.-treasurer,	Thos. R. Hinds.

"The minutes of the last meeting of directors of the 21st December, 1908, were read and confirmed.

"It was decided that the officers actively engaged in the management of the company should receive a salary to be settled on hereafter, this salary to date from May 1st, 1909.

"Adjournment.

"We, the undersigned directors of Toronto Construction Company Limited, hereby approve of and confirm the minutes of the directors' meeting of the said company above entered.

"George S. Deeks

"T. R. Hinds."

The plaintiff in his evidence claims that this resolution was not regularly put and passed at the directors' meeting; but, in my view, this contention is overborne by the evidence of the other directors and by the record in the minute-book. Needless to say the above resolution was too vague to be acted on; apart from that, no moneys could legally be paid to directors until confirmation by the shareholders.

Some controversy has arisen as to the details of the discussion which took place before, at, and after the meeting of the 10th January, 1910, and also as to the legal results of what transpired. If I understand the plaintiff's position aright, one suggestion made on his behalf is that what took place is to be treated as an offer by Cook to adjust the differences by salaries, and that this was promptly and irrevocably refused by Hinds and by Deeks, on

the ground that they were unwilling to work for a salary; that the resolution, though placed upon the minutes, was never further acted upon or referred to for six years; and that it was wholly ineffective and nugatory. In the alternative, the plaintiff suggests that, if the resolution and the proposal of a salary were ever acted upon, they were acted upon by the payment and allowance to Deeks and Hinds of \$10,000 per annum entered up as expenses and beginning from this date, the 10th January, 1910. A third suggestion on the part of the plaintiff is, that the arrangement respecting salary became in force, and that George S. Deeks and Hinds became employees of the company, bound as much from that time on, and in fact (if I correctly gather the position assumed) bound indefinitely to continue in the service of the company.

On the other hand, the position taken by the defendants is that they were unwilling to accept a salary as a permanent solution of the difficulties which had then arisen; and that, while they demanded a present salary as a palliative measure and as a temporary *modus operandi*, they were quite unwilling to agree to continue indefinitely on any salary basis. It is not unlikely that in a somewhat heated discussion statements were made by various parties which do not entirely coincide with each other or with the subsequent course of conduct; but, upon the whole, I give credit to the evidence now given by the defendants on this phase of the matter.

There is no doubt that there was dissatisfaction on various grounds, and that one of the particular grounds of dissatisfaction arose from the fact that George S. Deeks and Hinds were giving all their time and energy to the conduct of the affairs of the company and sharing the profits arising therefrom equally with Cook, while the latter was occupying his time and energy in working for himself. I think that the remuneration referred to in that resolution was remuneration to Deeks and Hinds, not as directors of the company, but for services in an executive capacity in managing its affairs as employees.

I have referred to these various points because they were much discussed at the trial; but the only relevant conclusion, according to my view, which is to be drawn from all this controversy is that, while no enforceable contract was made, yet any presumption that thereafter the services of Deeks and Hinds in superintending

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and managing the business were to be gratis, was effectually negated. The services thereafter rendered by Deeks and Hinds in managing and superintending the work of the company on the ground were, I think, thereafter rendered on the footing that they were to be paid for; and, while there was no contract legally enforceable at that time, I think, as mentioned before, that what was done suffices to negative the legal presumption that otherwise would have existed. The remuneration was to be on a basis to be agreed upon; and, if none was agreed upon, then on a *quantum meruit*. I think, however, that such remuneration was not due them as directors. As directors they remained unpaid in the same way as Cook and George M. Deeks; but as managers and superintendents of the company they were to be paid.

After this meeting, the work of the defendants George S. Deeks and Hinds in the management and superintendence of its operations proceeded substantially as before until July or August, 1911, but always with the conviction increasing that a severance must take place. I find no evidence, until the taking of the Lake Shore contract in 1912, that Deeks or Hinds refused to take contracts in the company's name. The only evidence looking in such a direction is the evidence that certain contracts which they thought they might have secured on the Grand Trunk Pacific were not acquired because Cook was unwilling to take charge of them, and Deeks and Hinds had all they could do in the work then on hand.

I pause here to observe that in May, 1909 (the date from which the resolution provides that salary shall run), the defendant company was actively engaged on the following contracts: (1) the Woodstock-Hartland contract, completed in 1909; (2) the Nominig contract, begun in 1907 and completed in the fall of 1909; (3) the New Brunswick contract on the Grand Trunk Pacific, begun in 1908 and completed in December, 1910.

The last contract was a contract of large dimensions, and it was current at the time the resolution was passed, in January, 1910. Subsequently to the passing of this resolution, the company took the following contracts: Seaboard contracts numbers 2 and 3, taken in May and December, 1910, and completed in 1912; and the Guelph-Hamilton contract, taken in 1911 and completed in 1912.

The taking of these subsequent contracts in the name of the defendant company indicates to my mind that George S. Deeks and Hinds were not, until October, 1911, prepared to carry out their wish to sever relations with Cook, and I think that until July or August, 1911, no overt act was done, by either of them, looking toward the winding-up of the defendant company or ceasing to provide it with work. But in July or August of the year 1911, the defendant George S. Deeks spoke to the Canadian Pacific Railway officials, informing them that the next contract available from that company he and Hinds desired to take on their own behalf, and not for the company. As appears more fully from the judgments in the former litigation, this action was taken in July without notice to Cook; and nothing further appears to have been done warning him of the situation that was developing except a further and stronger statement to him by Deeks in December, 1911, that the difficulty of continuing was growing greater, and that there must be a severance; but no notification was given of the intention to take the next contract personally to Deeks and Hinds. In March or April, 1912, the contract known as the Lake Shore contract was so taken in the names of George S. Deeks and Hinds, and Cook was then notified of their intention to cease taking further contracts in the name of the company, and to take them in their own names.

Cook objected, and brought an action to have it declared that George S. Deeks and Hinds were trustees of that contract for the defendant company. The defendants succeeded in that action in the Courts of Ontario; but, by the judgment of the Privy Council, the finding of the Courts of Ontario was reversed with costs, and it was directed, among other things, that it should be referred back to the High Court Division of the Supreme Court of Ontario to take an account of the profits belonging to the respondents the Toronto Construction Company Limited, and made by the other respondents (George S. Deeks, George M. Deeks, Hinds, and the Dominion Construction Company) out of the transaction known as the Shore Line contract, and that judgment ought to be entered in accordance with the findings of the referee. The judgment of the Privy Council was pronounced on the 29th day of February, 1916, and was entered in the Supreme Court of

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Ontario on the 29th day of March, 1916. On the 25th day of March, 1916, a resolution was passed by the directors of the defendant company as follows:—

“That there be paid to George S. Deeks, the president, he being an officer actively engaged in the management of the business of the company, a salary at the rate of and amounting to the sum of \$25,000 per year for each year commencing with the 1st day of May, 1909, and down to the 23rd day of February, 1912, and amounting in all to the total sum of \$70,461.43; and that there be paid to Thomas R. Hinds, an officer actively engaged in the management of the company, a salary at the rate of and amounting to the sum of \$25,000 per year for each year commencing on the 1st day of May, 1909, and down to the 23rd day of February, 1912, and amounting in all to the total sum of \$70,461.43; and that the amount of such salaries be paid to the said George S. Deeks and Thomas R. Hinds forthwith after confirmation of this by-law by the shareholders.”

The plaintiff objected to the passing of this resolution. The resolution was confirmed at a shareholders' meeting held on the 10th day of April, 1916, all the shareholders being present, except the plaintiff.

Supplementing the above narrative, I refer to one or two matters which could not conveniently be dealt with in the course of it.

The gross amount of the estimates on the work done by the defendant company from 1905 to 1912, exclusive of the Lake Shore contract, is \$10,755,165.51. The net profits of these contracts aggregate approximately \$1,690,765.21, and dividends have been declared and paid by the defendant company aggregating \$1,562,500. Just what portion of this profit was earned in the period between the 1st May, 1909, and the 23rd February, 1912, it is not possible to determine accurately. Mr. McKay asserts that it amounts to \$300,000 per annum during this period. Mr. Stewart maintains that it amounts to \$125,000 per annum. In the view that I take, it is not necessary to determine that question accurately. It is certain that profits aggregating at least \$125,000 per annum were made.

Respecting the item of \$10,000 of annual expenses credited to George S. Deeks and the defendant Hinds severally, in each year

of the period in question, counsel for the plaintiff say that they do not challenge the propriety of this annual allowance, but only the fact of any such expenditure. Undoubtedly, large expenditures were necessarily made on behalf of the business, both by George S. Deeks and by Hinds. They each swear that their annual disbursements for necessary expenses exceeded \$10,000 per annum. Without determining precisely the amount of such expenditures, which it is impossible for me to do, I do find that large expenditures, aggregating approximately \$10,000 per annum, were necessarily made. This action is not framed to deal with the question either of the fact of such expenditures or their propriety, and I do not adjudicate on it, either as an issue or as a question by itself. I assumed that the evidence on this item when tendered in the course of the trial was given solely for the purpose of proving that George S. Deeks and Hinds originally took these sums of \$10,000 per annum as and by way of the salary referred to in the resolution of the 10th January, 1910, and that in giving that evidence the plaintiff was seeking to lay the foundation for a claim that the resolution of the 25th March, 1916, granting an annual salary of \$25,000 was an afterthought, conceived for the first time after the judgment of the Judicial Committee of the Privy Council was announced, and designed for the purpose of fraudulently avoiding the results of that judgment. I find that these payments of \$10,000 each per annum were not salary; that they were never given or taken as such; and that the evidence in regard to them has no real bearing on the questions arising in this action.

Another phase of evidence somewhat pressed during the trial related to the work and remuneration of one McLean, who acted throughout the period in question as a superintendent and commissary man. McLean appears to have been a clever, active, and loyal employee of the company. But he was a subordinate only, and the remuneration paid him does not aid me in arriving at a conclusion regarding the remuneration paid to George S. Deeks and Hinds, who were responsible for the superintendence and management of all the work of the company.

I have perhaps stated the facts at unnecessary length; but, as the case involves a substantial sum of money, and is almost certain to go to appeal, it appeared to me desirable that I should err on the side of fulness in stating my views of the facts, rather than otherwise.

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Mr. Nesbitt's first argument in support of the plaintiff's position was that the relation of a director claiming a salary is that of an employee of the company; that it implies faithful service and the fulfilling faithfully of the duty cast upon him as an employee. He contended that the position of the defendants George S. Deeks and Hinds after the 10th January, 1910, was that of directors in receipt of a salary. He did not use the term managing directors, but I take it that that is the position in which he sought to place them; that they were exercising and obliged to exercise all the powers and authority appertaining to the office of a managing director; that they were to be paid as directors; and hints that from that time on they had an increased duty commensurate with their opportunity and their authority from the company; and he refers to the judgment of the Privy Council in the former action, *Cook v. Deeks*, [1916] 1 A.C. at p. 562, 27 D.L.R. at p. 8, where the Lord Chancellor says:—

“In other words they intentionally concealed all circumstances relating to their negotiations until a point had been reached when the whole arrangement had been concluded in their favour and there was no longer any real chance that there could be any interference with their plans. This means that while entrusted with the affairs of the company they deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect.” And he adds that the action of these two defendants in that regard has been such that it goes to the root of their whole service to the company, and negatives any right on their part to compensation.

Mr. Nesbitt further contends that, if it had been intended by the resolution of the 10th January, 1910, to grant remuneration for services in merely winding up the current affairs of the company, that purpose could have been effectively accomplished only by stating explicitly that such was the intention, and only if the arrangement was expressly on the basis that Deeks and Hinds were to continue solely for the purpose of winding up the existing contracts; and that they were to receive their salary for so doing.

I do not think that the words used by the Lord Chancellor, which I have quoted above, apply to the question which falls to be here determined. I think the ordinary rule applies, and that these words must be taken to refer to the issue which was before

the Judicial Committee in that former litigation, namely, whether or not there had been with respect to the Lake Shore contract a violation by Deeks and Hinds of the duty which their fiduciary relationship as directors imposed upon them toward the company. The present case relates to the validity of the payments made to them for their services in an executive and commercial capacity, not as directors. The two functions appear to me to be entirely distinct, and the breach of duty referred to in the judgment of the Privy Council was a breach of duty as directors; not a breach of duty as employees of the company. So far as the duty of superintending and managing the company's contracts is concerned, there has been disclosed no breach of any duty. George S. Deeks and Hinds gave all their time and skill to the management of the company's affairs, and did so with great success. At the time that the resolution of the 10th January, 1910, was passed, George S. Deeks and Hinds were under no obligation, any more than Cook or George M. Deeks, to give their time and skill to the superintendence and management of the affairs of the company. They might have lain idle, or they might have engaged in occupation along other lines than contracting. The duties of George S. Deeks and Hinds *quâ* directors did not at any time differ from those of Cook or G. M. Deeks. All were equally responsible for shaping the general policy of the defendant company. It does not appear that George S. Deeks and Hinds could effectively have bound the company to undertake any new contract; and, so far as securing new work for the company was concerned, it appears to me that the general manager of the company was equally concerned, and owed an equal duty to the company in that respect. In my view, the breach of their duty as directors in taking the Lake Shore contract in their own name, as found by the Privy Council, does not disentitle them from receiving the remuneration which has been awarded to them by the company, and which they earned in the subsidiary sphere of employees superintending and managing its work on the ground.

I agree, however, with Mr. Nesbitt in his statement that there is nothing said in the resolution, and nothing so far as I am aware in the evidence, to indicate that the remuneration should be for winding up the existing work of the company; and, if asked to do so, I would find as a fact that it was never stated that the remunera-

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tion which they were to receive was payable to them for winding up the company's affairs. Nothing looking in the direction of the cessation of the company's work or of its winding-up appears to have been explicitly stated to Cook, until Hinds' interview with him in March, 1912, after the Lake Shore contract had been procured.

I am not sure whether I have fully apprehended Mr. Nesbitt's second argument. If I have, it is that the defendants Deeks and Hinds are not entitled as a matter either of fact or of law to any remuneration, because the resolutions passed by the directors in March, 1916, and confirmed in April, were a mere fraudulent and unwarrantable and oppressive gift by the majority of the shareholders, made in fraud of the minority, and for the purpose of circumventing the judgment pronounced by the Privy Council. In support of the view he refers to Hinds' immediate repudiation in January, 1910, of any willingness to become an employee of the company at a salary, and the fact that there is no pretence of acting on the resolution from January, 1910, until April, 1916, and to the fact that the annual payment of \$10,000 is an absurd allowance for out of pocket disbursements, and asks that this allowance be considered salary in satisfaction of anything that was coming to Deeks and Hinds under the resolution of 1910. I am against Mr. Nesbitt's argument on this point. Undoubtedly, inconsistencies and inaccuracies of statement can be pointed out with respect to the defendants Deeks and Hinds, with respect to what they said in January, 1910, and with respect to their subsequent conduct at different periods. My reasons, however, will more clearly appear when I come to state the view which I myself have taken.

Mr. Stewart in his argument rests the case on a somewhat narrower ground than Mr. Nesbitt, namely, on the fact that from 1910 to 1912 the defendants betrayed the interests of the defendant company in refusing to take new business. I have already pointed out that I fail to find any evidence that they did at any time refuse business that was offered them; and it appears to me that, from the time when the salary began in 1909 down to July or August, 1911, no actual change in the conduct of the company's affairs took place. No doubt, at an early stage both Deeks and Hinds were so highly dissatisfied with their connection with Cook that

they intended, at as early a period as opportunity permitted, to sever their relationships; but, so far as any overt act was concerned and so far as anything was done to effectuate that nascent intention, I think that nothing actually took place until Deeks spoke to the Canadian Pacific Railway officials in July or August, 1911, about securing the next contract in the names of himself and Hinds personally; and after that they did not refuse to take new business, but, on the contrary, took the new business that was offered in the shape of the Lake Shore contract, taking it however in their own names, and being, as they thought and as the Courts of Ontario thought, entitled so to do. It has turned out that in that view they were mistaken; that they have committed a breach of the duty which they owed to the company and to their fellow-shareholders, and the suitable remedy has been afforded the plaintiff by the judgment of the Privy Council for that breach of duty. But the remuneration which was accorded to them by the resolutions of March and April, 1916, was not remuneration as directors or for anything concerned with the procuring of new business, but rather for the work and services which they were performing as employees of the company, superintending its operations in the field. So far as securing new business for the company is concerned, they were under no greater duty to secure new business for the company than G. M. Deeks or the plaintiff, who officially was the general manager of the company, and who, more than any other person, would therefore appear to be an officer who should see that the company acquired new business.

The view at which I have arrived on the argument so submitted may be thus stated: I think that the effect of the resolution of the 10th January, 1910, and of the discussion which then took place, is that it did away with any idea that the services of an executive and commercial character which were then being rendered by George S. Deeks and Hinds were thereafter to be rendered without remuneration. On the contrary, in so far, and only in so far, as their work differed from that of Cook and G. M. Deeks, they were to be entitled to remuneration; and the legal presumption that a director doing work for the company does it without reward was done away with. I think that is as far as the action of the 10th January, 1910, proceeds. I think that George S. Deeks and Hinds rested on that situation. On the face of it is

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needless to say that the resolution as it stood was incapable of enforcement. It manifestly contemplated further action. It was not only legally ineffective until confirmed by the shareholders, but it was too vague in itself to admit of any action being taken upon it. It therefore went only to the point which I have noted above, namely, it did away with the presumption that George S. Deeks and Hinds were acting without remuneration. As I have said, they rested on that; they were entitled to use it in closing up the affairs of the company, as they expected to do in 1912. Just how would they use it, and to what extent they would use it, does not appear; and they probably never reached a conclusion, knowing that, as they controlled the majority of the shares, they would be able to use the situation effectively whenever the necessity for using it arose. In 1912, instead of the affairs of the company being closed up, litigation intervened; and, as soon as it was ended, they acted upon it by passing the resolutions of March, 1916. I agree with the position taken by Mr. McKay, that he does not rest his right on the resolution of 1910, but on the by-law of 1916, and relies on the resolution of 1910 only as shewing that the action of 1916 was not fraudulent and as shewing that the action of Deeks and Hinds in not putting the company into liquidation in 1910, but in proceeding to wind up its affairs in the way they did, was the result of the resolution then passed making it plain that their services were to be remunerated; and, as Mr. McKay puts it, the questions are reduced to two: (1) Are the defendants entitled to salary, or have they disqualified themselves by what they have done? (2) Is the item so large that, without evidence of quantum, it is on its very face fraudulent and oppressive, and in oppression of the minority by the majority?

For reasons which have already appeared, I am of opinion that neither the general course of conduct pursued by Hinds and Deeks with respect to the taking of new contracts, nor their taking of the Lake Shore contract in their own name, disentitles them to remuneration. In reaching that conclusion I have perused the following cases, and it is needless for me to say that the view which I have taken appears to me to be borne out by the principles stated in these cases: *Andrews v. Ramsay & Co.*, [1903] 2 K.B. 635; *Hippisley v. Knee Brothers*, [1905] 1 K.B. 1; *Nitedals Taendstikfabrik v. Bruster*, [1906] 2 Ch. 671; *Stubbs v. Slater*, [1910] 1 Ch.

632; *E. Green and Son Limited v. G. Tughan and Co.* (1913), 30 Times L.R. 64; *Nocton v. Lord Ashburton*, [1914] A.C. 932. It does not appear to me that any advantage would accrue from a discussion by me of these various cases. I have not been referred to any cases in our own Courts, nor have I been able to discover any, which further elucidate the principles applicable. My conclusion on this branch of the case, therefore, is, that the defendants have not disentitled themselves to remuneration, because the only breach of duty committed by them was in respect to matters outside the scope of the duties for which they received remuneration. And for that breach of duty the appropriate remedy has been accorded in the former action, and so that breach of duty, if it ever had any bearing on the present controversy, has been fully expiated.

The situation then takes this form. The resolution having been passed in 1910, Deeks and Hinds proceeded to superintend and manage the commercial and executive affairs of the company from then on until 1912, on the basis that they were to be remunerated. That situation was never changed. Cook knew of it, and made no objection to it; no other shareholder made any objection; and the services were rendered, and effectively rendered, so that a profit of at least \$125,000 a year was earned and paid during this period. The shareholders have approved of the directors' resolution that the remuneration should be fixed at \$25,000 per annum each, and the quantum is a matter for domestic determination by the directors and shareholders, unless it is so outrageous and oppressive on the minority as to be clearly fraudulent. The only evidence in regard to the propriety of this allowance is, first, that of the employees of their company, indicating the nature of the duties performed by Deeks and Hinds; second, the testimony of G. S. Deeks and Hinds as to the character and extent of their various activities; and the evidence of one Jackson, who certainly appeared to me to be a man of wide general experience, and well qualified to testify on this point. He swore that, under these circumstances, and considering the profits which were made, he thought that a salary of \$50,000 each per annum was a proper salary. His evidence strongly impressed me as being not mere evidence of an expert, but the statements of a man who had received such salaries, and who was speaking not as an advocate but

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as a truthful witness when he expressed the view that such a salary was properly payable under the circumstances here shewn.

Another phase in which the question of amount has presented itself to me is this. Assuming that on the 1st May, 1909, Cook had been asked whether he would wind up the company or would leave his capital of \$50,000 in it on the understanding that Deeks and Hinds were to receive each \$25,000 per year salary, provided profits to that extent were realised, and Cook had been able to foresee that during that period he would, after allowing for such salaries, make profits annually of at least 32½ per cent. on his investment, would he have agreed to leave his money in? And does such a situation in reality differ from the situation which existed when the resolution was passed granting this remuneration in March, 1916?

For these reasons, I am of opinion that the plaintiff's claim on the first branch, namely, as to the remuneration to be awarded to these two defendants, fails.

With respect to the question of costs stated above, I am of opinion that these costs were awarded personally against the defendants George S. Deeks, George M. Deeks, and Hinds, for breach of duty committed by them individually, not in the performance of their duty to the company as directors, but adversely to that duty; and that it was, therefore, improper and unwarrantable for the costs so awarded to be paid out of the coffers of the company. Indeed, it is questionable whether they ought not personally to pay four-fifths of all these costs, but three-fifths is all that is asked for on the part of the plaintiff. The claim of the plaintiff, therefore, in this respect is allowed, and it is declared that the defendants George S. Deeks, George M. Deeks, and Hinds should pay personally three-fifths of the costs in question.

Judgment will therefore be dismissing the action in respect to the question of salary, and making a declaration with respect to the costs as above mentioned.

The defendants are entitled to the costs of the action, except the issue in regard to the question of costs, and the plaintiff is entitled to the costs of that issue, to be set off against the general costs of the action.

The plaintiff appealed from the judgment of MASTEN, J.

October 24, 1917. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

Wallace Nesbitt, K.C., and *A. M. Stewart*, for the appellant. The by-law purporting to grant to Hinds and Deeks a salary of \$25,000 a year from the 1st May, 1909, to the 23rd February, 1912, is invalid and should be set aside. These parties did not during the period in question render to the company the true, faithful, and efficient service to which the company was entitled. These parties took advantage of the fact that they were entrusted by the company with the performance of the services in question, to betray the interests of the company for their own benefit. These parties, apart from the salaries now under attack, drew from the company during the period in question an allowance of \$10,000 each per annum, which they say was for expenses, but of which they give no account, and which the plaintiff contends was for salary. The \$25,000 salaries were an afterthought, and were designed to operate as an off-set to a judgment obtained by the plaintiff in the action of *Cook v. Deeks*, [1916] 1 A.C. 554, 27 D.L.R. 1, rather than as a *bonâ fide* remuneration for services. The alleged confirmation of the salaries in question by the shareholders of the company was effected entirely by the votes of these parties themselves and should therefore be disregarded. At any rate, the salaries in question are grossly in excess of the value of the services. The defendants, as directors, were servants or agents of the company, and Hinds and Deeks were unfaithful in their service. The duties they owed the company were not severable, and so, being unfaithful in one respect, these men cannot claim remuneration for part, as if the duties were severable: *Hippisley v. Knee Brothers*, [1905] 1 K.B. 1; *Nocton v. Lord Ashburton*, [1914] A.C. 932. The remuneration covers an undivided period. The salary was not to be paid them as directors, but as executive officers. Their voting the salary to themselves was unfair to the plaintiff, a minority shareholder, and was fraudulent. The payment authorised by the by-law was simply a gift, and as such cannot be forced upon the minority shareholders against their will, when it was not incidental to carrying on the business of the company.

R. McKay, K.C., for the defendants, respondents. The defendants, under an understanding with the company in 1910, were to get these salaries. This understanding was confirmed by the

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by-law of 1916, which was *intra vires* of the company. These men were entitled to be paid for their services as executive officers. If there was any misconduct on their part, it was as directors, not as employees, and these duties are severable: *Nitedals Taendstik-fabrik v. Bruster*, [1906] 2 Ch. 671. Considering the very large profits which came to the company as a result of the efforts of these men, it would be unfair to interfere with the by-laws. The evidence fails to disclose any fraud whatever. As to the salary being a gift, there is no question of gift here, but a simple carrying out of a decision arrived at by the company years before the by-law was passed. The same consideration shews that the salary was not an afterthought.

Nesbitt, in reply.

March 1. RIDDELL, J.:—An appeal by the plaintiff from the judgment of Mr. Justice Masten at the trial in favour of the defendants.

In all matters of consequence on this appeal I accept the findings of fact of the learned trial Judge and base my judgment thereon.

The facts then seem to me to be that the defendants, directors of the Toronto Construction Company, and acting as servants or employees of the company, made up their minds as early as July or August, 1911, that, while they would faithfully act as servants of the company in completing contracts already entered into, they would not endeavour to obtain any further contracts for the company.

In July or August, 1911, George S. Deeks spoke to the Canadian Pacific Railway officials and told them that any future contracts would not be taken for the company, but for himself and his *confrère*. It is, I think, plain that this continued to be the fixed purpose and intention of the defendants. They carried on the affairs of the construction company in an eminently satisfactory manner so far as the construction contracts were concerned, i.e., so far as affected the carrying out of contracts already entered into; but they did so in such a way that they were destroying the business of the company and preventing its success in procuring further business to do.

There can be no doubt that "where the transactions between a principal and his agent are severable, and in some of them the

agent has been honest whilst in others he has been dishonest, he is entitled to his commission in all the cases in which he has been honest, but is not entitled to it in all the instances in which he has been dishonest:" head-note in *Nitedals Taendstikfabrik v. Bruster*, [1906] 2 Ch. 671.

And I think it is equally clear that, where the agent is to be paid for several inseparable duties, unfaithfulness—even without fraud—in the performance of any one of these duties will disentitle him to all remuneration; *cf.* what is said by Kennedy, J., in *Hippisley v. Knee Brothers*, [1905] 1 K.B. 1, at p. 9.

(In a case argued a few days ago in this Court, *Canada Bonded Attorney and Legal Directory Limited v. Leonard-Parmiter Limited*, (1918), *ante* 141, I have considered certain authorities in the English Courts and our own; and I do not here set them out again.)

Remembering that it was the duty of faithful servants, agents, employees—whatever name may be thought proper—so to carry on the business of the company as to attract further business and not to put the company out of business, I cannot think that the defendants were faithful to the company at all—the duties were not, I think, severable, but were inseparable.

In *Palmer v. Goodwin* (1862), 13 Ir. Ch. R. 171, a land agent had faithfully collected the rents and accounted for them, but "had in several instances grievously violated his duty with respect to the management of the property" (see p. 172), and the Master disallowed his fees accordingly. It was argued before the Lord Chancellor of Ireland that he should not be deprived of all remuneration for misconduct, because he had at all events faithfully collected and accounted for the rents. The Lord Chancellor said (pp. 173, 174):—

"He may very steadily and very faithfully collect and account for the rents, and yet very steadily and very completely destroy the estate . . . I must consider agency as a trust which casts on the agent the general management of the property; and if the agent fails in any breach of his duty, he fails in all."

While that was a peculiar case under peculiar circumstances, I think the language of the Lord Chancellor applicable in the present instance. The defendants might very steadily and very faithfully complete the contracts already had, and yet very steadily and very completely destroy the company's business prospects—

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they had the general management of the company's business, not simply the supervision of work in the field. I think they failed in their duty at least as early as August, 1911, and thence continuously till the close of the company's business.

I am not applying any supposed rule of trusteeship on the part of directors, but the ordinary rules governing principal and agent; and, applying these rules, I think the defendants were not entitled to any remuneration from the company whose whole future they were ruining, even had it previously been understood that they should be paid.

Not being entitled to remuneration after August, 1911, they cannot receive from the company any remuneration for that time without the unanimous consent of the shareholders.

The by-law is for remuneration from the 1st May, 1909, to the 23rd February, 1912: I think this must be set aside—on this record, there is no need of expressing any opinion as to whether, had the by-law limited remuneration to August, 1911, as the latest date, it would be valid.

Nor do I consider the argument that the by-law was not *bonâ fide*.

I would allow the appeal with costs here and below.

LENNOX, J.:—I have had the advantage of reading the judgment of the learned Chief Justice, and, with regret and very great respect, I find myself unable to agree in the conclusions he has reached.

The Toronto Construction Company was incorporated in 1905 for the purpose of contracting for and engaging in the construction of railways in Canada, and continued to carry on this business until about March or April, 1912, when the individual defendants incorporated the Dominion Construction Company for the purpose of engaging in and carrying on the same class of work.

Although the company has not been wound up, and still legally exists, it has, through the action of a majority of its shareholders, the individual defendants, ceased to carry on business, and has not accepted any contract since 1911; nor has it been engaged in carrying on construction work since the completion of the Guelph-Hamilton contract in 1912.

The capital stock of the company is \$200,000, in shares of \$100

each. Mrs. Deeks, wife of George S. Deeks, is the holder of one share and her husband of 499. The plaintiff said the other individual defendants are holders of 500 shares each. There must of course be at least five shareholders to comply with the provisions of the Companies Act; hence, no doubt, the introduction of Mrs. Deeks as the holder of one share.

At a meeting of directors on the 25th March, 1916, after the company had ceased to do business, after a new company, through the agency of the individual defendants, had been incorporated and had taken the place of the Toronto Construction Company, and almost immediately after the termination of litigation between the parties to this action, in which the individual defendants were found to have acted unfairly and dishonestly towards the plaintiff, as a shareholder in the Toronto Construction Company, these defendants—without the consent and against the protest of the plaintiff—passed the following resolution or by-law:—

“Moved by George M. Deeks,

“Seconded by T. R. Hinds,

“That there be paid to George S. Deeks, the president, he being an officer actively engaged in the management of the business of the company, a salary at the rate of and amounting to the sum of \$25,000 per year for each year commencing with the 1st day of May, 1909, and down to the 23rd day of February, 1912, and amounting in all to the total sum of \$70,461.43; and that there be paid to Thomas R. Hinds, an officer actively engaged in the management of the company, a salary at the rate of and amounting to the sum of \$25,000 per year for each year commencing on the 1st day of May, 1909, and down to the 23rd day of February, 1912, and amounting in all to the total sum of \$70,461.43; and that the amount of such salaries be paid to the said George S. Deeks and Thomas R. Hinds forthwith after confirmation of this by-law by the shareholders.”

And this by-law was subsequently approved of and confirmed by a by-law of the shareholders voted upon and carried by these defendants, and, it may be, by the proxy vote of Mrs. Deeks as well. (The minutes record: “Present in person, George S. Deeks, George M. Deeks, and Thomas R. Hinds; present by proxy, Helen E. Deeks;” but this is all.)

The plaintiff, amongst other things, by this action seeks to set

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aside these by-laws, to prevent the payment of the money referred to out of the assets of the company, and to compel the repayment of it, if already paid. The Toronto Construction Company is also made a party defendant. It will be convenient to refer to the individual defendants as "the defendants." The learned Judge at the trial dismissed the action as to this relief. With deference, I am of opinion that he erred in this respect. It is not denied that, until they diverted the Lake Shore contract from the Toronto company to themselves, and to the Dominion Construction Company, when it was incorporated, the defendants, or Hinds and George S. Deeks at all events, were reasonably zealous and active in promoting the company's business; that their management as directors was efficient; or that exceptionally large profits accrued to the shareholders. Indeed, the enormous profit obtained has been made a basis for the argument that the by-laws ought not to be interfered with. I cannot see it in that way. The profits belonged to the company. My agent or trustee who unlawfully appropriates my goods or moneys can hardly justify upon the ground, "You could well afford it." That is not the question: it is wrong or it is right, be the amount little or much, and the amount is of no consequence except in so far as it lends colour to their act.

The directors in passing the by-law manifestly desired to base it upon, and expected it to derive support from, an entry in the minutes, alleged to be "a resolution" of a meeting of directors of the 10th January, 1910, in these words: "It was decided that the officers actively engaged in the management of the company should receive a salary to be settled on hereafter, this salary to date from May 1st, 1909."

The defendants to whom the salaries are to be paid under the by-law attacked were, before and on the 10th January, 1910, and continuously thereafter, directors of the company, and have never been appointed to, or occupied, any other position. Until quite recently the plaintiff has been general manager of the company. Hinds has been and is secretary-treasurer.

The learned Judge finds, upon the evidence in this action, that the defendants Hinds and George S. Deeks, as was determined in *Cook v. Deeks*, in the Privy Council, were guilty of bad faith and misconduct in the discharge of their duty to the company; and

he quotes from the judgment of the Lord Chancellor, where he says: "In other words they intentionally concealed all circumstances relating to their negotiations until a point had been reached when the whole arrangement had been concluded in their favour and there was no longer any real chance that there could be any interference with their plans. This means that while entrusted with the affairs of the company they deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect." And the learned Judge (Masten, J.) concludes that there is a distinction to be drawn between the acts of these men as directors and their acts and conduct as employees or servants of the company. As to this the learned Judge says:—

"I do not think that the words used by the Lord Chancellor, which I have quoted above, apply to the question which falls to be here determined. I think the ordinary rule applies, and that these words must be taken to refer to the issue which was before the Judicial Committee in that former litigation, namely, whether or not there had been with respect to the Lake Shore contract a violation by Deeks and Hinds of the duty which their fiduciary relationship as directors imposed upon them toward the company. The present case relates to the validity of the payments made to them for their services in an executive and commercial capacity, not as directors. The two functions appear to me to be entirely distinct, and the breach of duty referred to in the judgment of the Privy Council was a breach of duty as directors; not a breach of duty as employees of the company."

And again: "In my view, the breach of their duty as directors in taking the Lake Shore contract in their own name, as found by the Privy Council, does not disentitle them from receiving the remuneration which has been awarded to them by the company, and which they earned in the subsidiary sphere of employees superintending and managing its work on the ground."

This is not, to my mind, the only or principal question in the determination of this appeal, but it is of sufficient importance to warrant discussion. With great respect, I am unable to discover a well-grounded distinction either in fact or in law. As to the fact, I am of the opinion that the wording of the by-law is opposed to this contention, and I find nothing in the evidence to warrant

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the conclusion that either of these men was at any time engaged or employed as an employee or servant of the company; or understood to be serving the company in any capacity except as a director. The company employed servants and agents, but these were engaged by antecedent agreements for specific remuneration, and with their duties defined. Every year \$10,000 was credited to each of these defendants as personal expenses, but no entry for wages or salary as employees was ever made or claimed. Profits were ascertained from time to time, and dividends paid on the basis of net profits, in proportion to share capital, and there is no suggestion of anything in arrear. This was the work or in the main the work, or under the superintendence, of these two defendants, at the head office in Toronto. The shares were transferable in the ordinary way.

Whatever may be said as to it being in the contemplation of the parties that something might at some time be voted by the shareholders while the company was a going concern by way of honorarium to Hinds and George S. Deeks in recognition of extra work devolving upon them as directors, I cannot bring myself to believe that they ever regarded themselves or that they were regarded by anybody as occupying any position or discharging duties other than those pertaining to their official positions; and, on the other hand, as a matter of law, I cannot perceive how misconduct which is inexcusable in a director is excusable in the case of a confidential agent and servant.

It is idle, I think, to argue in this case what may be done to bind a dissenting minority by an independent majority of directors or shareholders exercising discretionary powers and acting in good faith. The policy of the company—particularly while it is a going concern—is, within the scope of the charter, to be shaped by the directors; and their discretionary powers, when honestly exercised and confirmed by the shareholders, are not to be lightly disturbed by the Courts. They can, of course, condone the misconduct of their agents. But it is another matter where there has been grave misconduct, if there is evidence of bad faith, if independent action is impossible, if the giver and the taker is the same person, and the vote could not be carried without the vote of the beneficiary or payee, as in this case.

And again, referring to the conduct of these defendants, it is said in the judgment in appeal:—

"My conclusion on this branch of the case, therefore, is, that the defendants have not disentitled themselves to remuneration, because the only breach of duty committed by them was in respect of matters outside the scope of the duties for which they have received remuneration. And for that breach of duty the appropriate remedy has been accorded in the former action, and so that breach of duty, if it ever had any bearing on the present controversy, has been fully expiated:" and the judgment is manifestly rested upon this ground.

As I have said, there is no evidence that the defendants acted in a dual capacity; their position in relation to the company and "the scope of their duties" demanded of them the most scrupulous good faith in all things concerning the interests of all their associates. No one of them was exclusively engaged in the business of this company; all were engaged in partnerships or individuals enterprises as well, from which individual profits were concurrently accruing. By the continued experience, capacity, foresight, and energy of all—of necessity contributed in varying degrees and in different lines, but each to be set off against the other—a stage had been reached when, owing to its reputation and prestige, almost fabulous profits were accruing to the company—the common proportionate right or property of each shareholder. By the 4th December, 1911, dividends had been declared amounting to \$1,162,500, on a capitalisation of \$200,000, in which these so-called servants had participated, or say at the rate of \$50,000 a year; to say nothing of profitable individual and partnership enterprises, and the \$10,000 a year for personal expenses, which, but for the opinion of the learned Judge, I should have judged, was three-fourths "compensation" for extra activity and zeal.

It was at this stage of the company's phenomenal success, and "while entrusted with the conduct of the affairs of the company, that they" (the three individual defendants in this action) "deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect," to quote from the judgment of the Privy Council, and it was at this time and under these circumstances that the defendants to be remunerated, with the assistance of George M. Deeks, succeeded not only in diverting a profitable contract with the

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Canadian Pacific Railway Company—the subject of the litigation referred to—to themselves, but in addition turned over the practically priceless business and goodwill of “the company whose interest it was their first duty to protect” to the Dominion Construction Company. This case is of course to be decided on its own facts, and I refer to the decision in the earlier case only for principles that should guide me. All that was directly involved in the former action was the profits of the Lake Shore contracts; and these profits, so far as they can be ascertained, are to be accounted for. Is this full expiation, and, if it is, is it to be countered by the by-laws in question, carried by the same controlling majority?

I come now to what does not appear to have been so much in the mind of the learned Judge. I care little whether the remunerated shareholders were regarded as directors or servants or both. I need not consider what would be the result if the by-laws had been limited to the period during which Hinds and George S. Deeks were not shewn to have been unfaithful to the obligations their position imposed. This is not what was done—the remuneration covers one undivided period. Nor need I consider the law as applied to other facts. The fact here is that these large sums of money were voted by themselves to themselves, after the company had ceased to do business, after a long period of silence and acquiescence—which to me has not been satisfactorily explained—and on the heels of the judgment for “expiation” referred to.

Was it voted in good faith, in discharge of their duty as directors and quasi-trustees, and with due regard to the fiduciary obligations which Courts must insist upon or impose—and the circumstances point the other way—or was it, to paraphrase paragraph 4 of the notice of appeal, “an afterthought designed to operate as a set-off to the judgment obtained by the plaintiff in *Cook v. Deeks* rather than as a *bonâ fide* remuneration for services?” I am of opinion that the powers of the directors were not exercised *bonâ fide*; that the defendants Hinds and George S. Deeks were not fairly entitled to the sums of money voted to them; that this was not an honest exercise of the discretionary powers admittedly allowed to directors under ordinary circumstances; that what was done was knowingly and intentionally dishonest; that, whatever may be the undisclosed cause, it looks like a design, amongst other things, to counteract in some degree the judgment then just pronounced in the previous

action; that, having regard to the circumstances to which I have referred, the amount is large enough to afford evidence of fraud; and that what was done was unfair to the plaintiff, a minority shareholder, oppressive, and clearly dishonest.

The appeal should be allowed, and the judgment in appeal in so far as it dismisses the plaintiff's claim should be set aside, and for this there should be substituted a judgment setting aside the by-laws in question, and, if the moneys have been paid out, directing the repayment by the defendants, other than the company, to the Toronto Construction Company, with interest from the date of payment out, and for the costs of the action here and below, less such costs, if any, as have been already paid.

ROSE, J.:—The only question that we have to determine is the validity of a by-law passed by the directors of the Toronto Construction Company Limited on the 25th March, 1916, and confirmed by the shareholders on the 10th April, 1916, whereby it was enacted, following the wording of a resolution passed by the directors on the 10th January, 1910, that there be paid to the president, the defendant George S. Deeks, "he being an officer actively engaged in the management of the business of the company," a salary at the rate of \$25,000 a year for the period commencing on the 1st May, 1909, and ending on the 23rd February, 1912, amounting in all to \$70,461.43, and that there be paid to one of the directors, the defendant Hinds, "an officer actively engaged in the management of the company," a like sum, for the same period.

In approaching the question as to the validity of that by-law, the first inquiry, as it appears to me, ought to be whether, if the by-law had not been passed, George S. Deeks and Hinds would have had any enforceable claim against the company for salary for the period in question: for, if they would not have had such a claim, the governing considerations are rather different from the considerations that would have been applicable if the by-law had merely fixed the amount to be paid in respect of services which had given rise to a valid claim for remuneration. This question as to the right to a salary, apart from the by-law of 1916, must depend largely upon the view that is taken of the effect of what was done in January, 1910. (I leave out of consideration for the present the

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question as to the effect of the misconduct established in the case of *Cook v. Deeks*.)

During the latter part of the year 1909, Deeks and Hinds, who were actively engaged in carrying on the company's work in connection with the contracts then on hand, seem to have become dissatisfied with their position: they thought that the plaintiff, Cook, was reaping the benefit of their labours, while he was devoting his own time to work in which neither they nor the company had any interest. Cook does not admit that there was any real ground for complaining of his conduct; on the contrary, he complains that his co-directors refused to undertake, for the company, contracts which he had procured and which he desired to turn over to the company; but it does not seem to be material to decide, at any rate in connection with the matter at present under discussion, whether Cook had or had not failed in any duty which he owed to the company or to his associates. The matter was discussed, probably in 1909, certainly on the 10th January, 1910. On the last mentioned day there was a meeting of the directors. Cook seems to have recognised the fact that it would be fair that Deeks and Hinds, who were attending to the work of the company, while he was attending to his own affairs, should be paid salaries; and there was put upon the books of the company a record of a decision "that the officers actively engaged in the management of the company should receive a salary to be settled on" thereafter; "this salary to date from May 1st, 1909." Cook denies that this was passed at the meeting, and he points to the fact that a confirmation of the minutes, which was signed by George S. Deeks and Hinds, was not signed by him; but Mr. Justice Masten finds, on the evidence, that it was regularly passed, and his finding must be accepted. There is a dispute as to what the parties meant by the resolution: Deeks and Hinds say that they were not willing to "work for Cook for a salary," and that they were unwilling, unless paid, even to finish the work that the company then had on hand, and that they so expressed themselves: Cook says that he had "no objection to their getting a salary, if they were going to continue the business, but would not have discussed a salary, under any consideration, if they were not going to continue the work of the company." Mr. Justice Masten, while giving general credit to Deeks' and Hinds' account of the conversation, finds that "it

was never stated that the remuneration which they were to receive was payable to them for winding up the company's affairs. Nothing looking in the direction of the cessation of the company's work or of the winding-up appears to have been explicitly stated to Cook, until Hinds' interview with him in March, 1912, after the Lake Shore contract had been procured."

After the 10th January, 1910, the company completed the work then on hand, and undertook and completed three other contracts, called "Seaboard numbers 2 and 3" and the "Guelph-Hamilton contract." These contracts, however, were not looked upon as new contracts: "Seaboard numbers 2 and 3 were regarded as merely a continuation of the former allotting to the company of the work on the Seaboard line, which had been originally tendered for as a whole, and, as they (the defendants) understood and contended with the Canadian Pacific Railway Company, awarded to them as a whole;" and "the Guelph-Hamilton was a small contract, taken because it was thought it could be finished about the same time as the other work which they had in hand." The way in which Deeks and Hinds were occupied after January, 1910, is summed up in Hinds' evidence on discovery, in the statement that during 1910 the Seaboard work went on, during 1911 they devoted themselves to cleaning up the work then on hand, and gradually brought the operations of the company to a close, and had the work practically completed except some reballasting, etc., that remained to be done in 1912. About July, 1911, Deeks told a representative of the Canadian Pacific Railway Company that he was "through with the Toronto Construction Company," and that any work taken by him and Hinds in the future would be on their own account; and in March or April, 1912, they took in their own names the "Lake Shore" contract, to the benefit of which, as has been decided, the company was entitled.

Both the by-law of 1916 and the resolution of the 10th January, 1910, provide for salary for services rendered from May, 1909, onwards. As to the period from May, 1909, until the 10th January, 1910, I cannot see how it can be argued that, without the by-law of 1916, there is any legal claim for remuneration. There is no pretence that, during that time, Deeks and Hinds were relying upon any express or tacit agreement, either with the company or with Cook, that they were to be paid for what they did. They

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were simply "working members" of the company, with no legal claim upon the company for remuneration: see *Re Bolt and Iron Co., Livingstone's Case* (1887-88), 14 O.R. 211, 16 A.R. 397; and the resolution or "decision" of January, 1910, providing for payment for those past services did not strengthen their position, because, apart from the fact that it did not fix the amount to be paid, there was no ratification of it by a general meeting, as required by the Ontario Companies Act then in force, 7 Edw. VII. ch. 34, sec. 88.

As to the time after the 10th January, 1910, however, Mr. Justice Masten thinks that the resolution and the contemporaneous discussion did away with any idea that the services to be performed by Hinds and Deeks, not strictly as directors, but as employees of the company superintending its operations in the field, were to be performed without remuneration; he thinks that "that s as far as the action of the 10th January, 1910, proceeds:" he finds that Hinds and Deeks "rested on that; they were entitled to use it in closing up the affairs of the company, as they expected to do in 1912. Just how they would use it, and to what extent they would use it, does not appear; and they probably never reached a conclusion, knowing that, as they controlled the majority of the shares, they would be able to use the situation effectively whenever the necessity for using it arose." I do not understand the learned trial Judge to mean that the result of what was said and done on the 10th January, 1910, was that Hinds and Deeks acquired a legal right to payment for their future services—a right which they could enforce by an action for payment as upon a *quantum meruit*, if the company did not, by a valid by-law, "settle" the amount left unsettled by the resolution; I think, rather, that the language quoted was used in reference to the argument addressed to him by counsel for Deeks and Hinds, that the resolution was relied upon merely "as shewing that the action of 1916 was not fraudulent and as shewing that the action of Deeks and Hinds in not putting the company into liquidation in 1910, but in proceeding to wind up its affairs in the way they did, was the result of the resolution then passed making it plain that their services were to be remunerated." If, however, he intends to go farther, and to hold that a right to enforce payment was created, I am, with much respect, unable to agree. Assuming that the resolution, if it had

been valid or capable of being acted upon, would have served as a foundation for a claim for payment for services rendered in merely finishing the work upon the existing contracts and winding up the company's business, it is not plain to me how, being invalid, it can be treated as evidencing a contract that the officers "actively engaged in the management of the company should receive a salary;" and, in the absence of such a contract, there cannot be a claim.

Re Bolt and Iron Co., Livingstone's Case, 14 O.R. 211, 16 A.R. 397, seems to be conclusive upon that point. Livingstone was managing director of the Bolt and Iron Company Limited. There was a by-law that "the directors and managing director shall be paid for their services such sums as the company may from time to time determine at a general meeting." A general meeting determined that the managing director's salary should be \$4,000 per annum until a day named. After that time Livingstone continued to perform the services of managing director, but the company did not fix his salary; and it was held by the Chancellor, whose judgment was affirmed by the Court of Appeal, that Livingstone had no claim in the winding-up, and must account for salary which he had received. The rule is stated by the Chancellor as follows (14 O.R. at p. 216):—

"The position of the managing director rendering services for which remuneration is given, is not that of a servant hired by the company. His position is aptly defined by Pearson, J., in *In re Leicester Club and County Racecourse Co., Ex p. Cannon* (1885), 30 Ch. D. 629, at p. 633, as a working member of the company who gets paid for the work he does. The rules as to hiring and notice between master and servant are therefore not applicable, and the measure of the rights of the salaried managing director is to be settled by what is provided in that behalf by the charter and by-laws of the company."

Mr. Justice Masten points out that the work for which Deeks and Hinds claim payment was not the ordinary work of directors—attending board meetings etc.—but work as employees of the company, superintending its operations in the field. The same thing was true of Livingstone: the duties performed by a managing director are quite different from the duties cast upon the other directors. Moreover, apart from the fact that a by-law for

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payment of directors is invalid and cannot be acted upon until it is confirmed by the shareholders (of course, the same is true of a resolution—see *Mackenzie v. Maple Mountain Mining Co.* (1910), 20 O.L.R. 615), Deeks and Hinds had no right to vote at a directors' meeting in respect of the proposed arrangement that they should be employed by the company, and I think they never became "employees:" The Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 89, now R.S.O. 1914, ch. 178, sec. 93; *Young v. Naval Military and Civil Service Co-operative Society of South Africa*, [1905] 1 K.B. 687.

The case is not like one recently before us in which a general manager, who had ample power to engage servants, had engaged one of the directors as a traveller, no by-law or resolution of the directors being passed or needed; it is simply the case of "working members" of the company saying, "We will work no longer unless we are paid," passing an invalid resolution for their own payment, continuing their work, and then claiming that, because the company has had the benefit of their services, it must pay for them. If the company had gone into liquidation without passing the by-law of 1916, could it have been held, in the face of *Livingstone's Case*, that Deeks and Hinds had a valid claim? I cannot believe it, even if it is correct to say, as Mr. Justice Masten does, that from the 10th January, 1910, "Deeks and Hinds proceeded to superintend and manage the commercial and executive affairs of the company from then on until 1912, on the basis that they were to be remunerated." Moreover, I do not draw from the evidence the inference that Deeks and Hinds did their work relying upon any supposed obligation of the company to pay. If they did, what explanation is there for the facts that when, in March, 1912, there was a discussion of a proposed purchase of Cook's shares by George S. Deeks, and Deeks furnished Cook with an inventory of the company's assets, he made no reference to the necessity of providing for salaries, and will not now say that such necessity was present to his mind; that in April, 1913, there was a distribution of profits which left the company with net assets of only about \$30,000 over and above the amount of its capital stock, and still no provision for salaries; that, in the six years following the resolution of the 10th January, 1910, there was never a word about salaries until the Judicial Committee of the Privy Council had decided that Deeks

and Hinds held the Lake Shore contract for the benefit of the company?

If I am right in the view that I take as to the legal position as it existed prior to the passing of the by-law of 1916, it follows that the payment authorised by that by-law was merely a gratuity. If I am right only as to the period from May, 1909, until the 10th January, 1910, then, in so far as the payment is for services rendered during that period, it is a gratuity. In either case, as it appears to me, the by-law is bad; in the one case because there is no justification for any part of the payment; in the other because it is a single payment and covers some services for which the majority cannot compel the minority to pay.

Of course, it is not necessarily beyond the powers of a company to grant gratuities to its directors: such a power may well exist as incidental to the carrying on of the business of the company; but it is only as so incidental that it can be exercised—or, at least, that it can be so exercised as against the will of a minority of the shareholders. This is explained very fully by Lord Justice Bowen in *Hutton v. West Cork R.W. Co.* (1883), 23 Ch. D. 654, at pp.671-2. He says:—

“The money which is going to be spent is not the money of the majority. That is clear. It is the money of the company, and the majority want to spend it. What would be the natural limit of their power to do so? They can only spend money which is not theirs but the company’s, if they are spending it for the purposes which are reasonably incidental to the carrying on of the business of the company. That is the general doctrine. *Bona fides* cannot be the sole test. . . . The test must be what is reasonably incidental to, and within the reasonable scope of carrying on, the business of the company.”

And, later on, after discussing the position of directors as regards remuneration, he proceeds:—

“One must still ask oneself what is the general law about gratuitous payments which are made by the directors or by a company so as to bind dissentients. It seems to me you cannot say the company has only got power to spend the money which it is bound to pay according to law, otherwise the wheels of business would stop, nor can you say that directors who have got all the powers of the company given to them . . . are always to be

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limited to the strictest possible view of what the obligations of the company are. They are not to keep their pockets buttoned up and defy the world unless they are liable in a way which could be enforced at law or in equity. Most businesses require liberal dealings. The test there again is not whether it is *bonâ fide*, but whether, as well as being done *bonâ fide*, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit."

Then, after referring to some of the authorities, and after quoting a passage from Lord Justice Fry's judgment, in which occurs the sentence: "Of course, if the majority of the shareholders present think it undesirable or improper to vote remuneration for past services the directors can have no claim whatever; but in case the majority think it reasonable and fit to vote a sum of money for past services, it appears to me a matter in which the majority can bind the minority;" Lord Justice Bowen continues (p. 674):—

"If that is meant as a simple test, I confess I do not agree with it, although I need hardly reiterate the respect I have for the opinion of the Lord Justice. If it means that within certain limits that is the test, I agree; but the ultimate test is not *bona fides*, but what is necessary for carrying on business. That is the test which Lord Justice Fry has not applied to this case."

The company in the case from which I have quoted had sold its undertaking; and, although it remained alive, it was not a going concern in the full sense of the term; its business was merely to wind itself up and carry on its own internal affairs until it had distributed the purchase-money. Technically, therefore, its position was not the same as that of the Toronto Construction Company in 1916; but Lord Justice Bowen's reasoning seems to me to be quite as applicable to the *Toronto* company as to the *West Cork* company. It cannot be suggested that the by-law of 1916 was passed as incidental to the carrying on of the company's business; the business was over, and nothing remained to be done but to take the accounts and distribute the assets; no benefit could possibly accrue to the company from the making of the payments; and it seems to me to be simply a case in which, to quote Lord Davey, in *Burland v. Earle*, [1902] A.C. 83, 93, "the

majority are endeavouring directly or indirectly to appropriate to themselves money . . . which belong(s) to the company, or in which the other shareholders are entitled to participate." That being so, there is no question of the right of the plaintiff to maintain the action.

Before us the appellant's case was put upon a rather broader, or perhaps I should say more meritorious, ground than the ground I have taken. It was contended that George S. Deeks and Hinds had not rendered to the company, during the period in question, the faithful service to which it was entitled, but had, on the contrary, betrayed the interests of the company, which, as directors, it was their duty to protect; that they had abstained from seeking new business for the company, and had attempted to appropriate to themselves the benefit of the Lake Shore contract, which really belonged to the company. It was also contended that certain sums of \$10,000 a year which each of them had taken, nominally as reimbursement for expenses incurred by them while on the company's business, were in reality taken as the salary mentioned in the resolution of the 10th January, 1910; and, finally, that the amount of the salary fixed by the by-law of 1910 was so excessive as to indicate fraud.

Mr. Justice Masten, who saw and heard the witnesses, and is in a better position than we are to decide as to their credibility, finds as a fact that the annual payments of \$10,000 were not salary; and, although the evidence leaves in my mind a great doubt as to whether George S. Deeks and Hinds did really spend as much as \$10,000 a year each in connection with the company's business, I am not prepared to say that the finding is wrong. So too, as to the salary fixed by the by-law of 1916: there was evidence that the amount was not unreasonable, considering the value of the services which it was assumed the allowance was intended to cover; and I think that, in face of Mr. Justice Masten's finding to the contrary, we cannot hold that the sum awarded is so excessive as to lead to the conclusion that the by-law was passed in fraud of the company.

As to the other ground, however, the ground that Deeks and Hinds had so acted as to forfeit any claim which they might otherwise have had to be paid for their services, I am in accord with Mr. Justice Riddell, whose opinion I have had the privilege of

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reading. The judgment of the Judicial Committee of the Privy Council is, to my mind, conclusive as to the quality of the acts that were in question in the case of *Cook v. Deeks*, and that are put forward by the plaintiff here as disentitling those directors to be paid for the services in fact rendered by them to the company; and, if these reprehensible acts were done in connection with the office to which the salary voted by the by-law of 1916 attaches, it seems to me that they destroyed any right which there might otherwise have been to be paid for the work done in that office—at least, any work done after the inception, in or about July, 1911, of the plan to exclude the company from the benefit of the Lake Shore contract. But it is said that the misconduct was in the execution of the duties of Deeks and Hinds as *directors*, whereas the salary was voted for services as *employees* of the company, superintending its operations in the field; that it was not for anything in connection with the procuring of new business. With deference, I think that this distinction is too finely drawn. Deeks and Hinds do not say explicitly how the figure of \$25,000 a year was arrived at; but, as will appear, there seems to be enough on the record to shew that the salary was intended to pay for the services rendered in the very position which the Lord Chancellor describes these defendants as occupying—the very position which made it improper to attempt to divert to themselves the benefit of a contract that ought to have gone to the company.

“It” (the question that was under discussion) “cannot,” says the Lord Chancellor in *Cook v. Deeks*, [1916] 1 A.C. at p. 561, “be properly answered by considering the abstract relationship of directors and companies; the real matter for determination is what, in the special circumstances of this case, was the relationship that existed between Messrs. Deeks and Hinds and the company that they controlled. Now it appears plain that the entire management of the company, so far as obtaining and executing contracts in the east was concerned, was in their hands.”

And again (p. 562): “While entrusted with the conduct of the affairs of the company they deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect.”

And later on he says (p. 563): “Men who assume complete control of a company’s business must remember that they are not

at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent."

When Hinds was called as a witness, counsel for the defendants drew from him an account of the services that he and George S. Deeks had rendered to the company, including the obtaining of contracts; and then, coming to the by-law of 1916, asked him what he had to say as to the \$25,000 being reasonable; to which he answered that he thought it was "very modest under the circumstances." George S. Deeks was likewise examined as to what had been done, and, after being questioned as to some other matters, was asked, "Upon what did you base your figures?" The witness answered: "We considered the magnitude of the work we were doing, the turn-over, the amount of money we were making, and also the moneys that I understood people were getting in positions similar or probably less responsible." George M. Deeks simply said that those at the meeting were absolutely satisfied—thought \$25,000 very reasonable. All this seems to me to make the matter fairly plain; but it is in the evidence of the expert witness who so favourably impressed Mr. Justice Masten, and in the by-law itself, that it seems to be made quite clear that the salary was voted for the services rendered in the position which the judgment in *Cook v. Deeks* describes these defendants as occupying, and in which they betrayed their trust. The case that was put to the expert witness was the case of a company "managed by two men who jointly get the contracts, superintend the construction, and have general charge and control of its business." The salary, according to the by-law, is given to officers "actively engaged in the management of the business of the company." I cannot find any evidence at all in conflict with the evidence to which I have referred. Therefore, it appears to me that it is impossible to hold that the duties for the performance of which the salaries were voted are so separable from the duties which Deeks and Hinds failed to perform that there can be a right to demand payment in respect of the former, although there is no such right in respect of the latter; and upon this branch of the case I agree, as already stated, with Mr. Justice Riddell, for the reasons which he states.

I would allow the appeal.

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MEREDITH, C.J.C.P. (dissenting):—If we would bring this matter to a right conclusion, we should always bear in mind the kind of company which that in question was, what its purposes; and how, and by whom, the business done in its name was transacted, and its great profits gained. The need of this warning, and care, is made the more urgent by the not infrequent use, by Judge as well as interested counsel, of the word “company” when what was really meant was Cook, the plaintiff; and the tendency to discuss the case as if the company were one of the more ordinary character, comprising many shareholders, and having many different interests; and the defendants, other than the company, though nominally four-fifths and substantially three-fourths of it, as if something of that character which, in a celebrated case, Bacon, S.-G., seems to be reported as having described as “mere cyphers in algebra.”

The company was comprised of four large, and one small, shareholders; the holder of the few shares being added because not less than five persons could become incorporated as this company was; and the main purpose of this incorporation, and all like incorporations, is “limited liability”—exemption from personal liability, of the persons concerned, beyond the amount of the unpaid price of the stock owned by them; and—that which it is very important to bear in mind—one of the main effects of such incorporation is to fasten upon all the partners—for such substantially they are—that which is commonly called “majority rule.” And so we have here an incorporated company, with limited liability, having a capital of only \$200,000, carrying on business involving millions of dollars, and carried on, by the defendants Hinds and George S. Deeks, in such a manner that the whole capital stock of the company may be described as insignificant in comparison with the business done and profits earned.

Then, during the period in question, the business done, in the name of the company, was carried on entirely by these two defendants, whom the plaintiff seeks, in and by this action, to deprive of all remuneration for such services; and by their labour and skill alone those great profits were won: and, during all that time, the plaintiff, though a director of the company and its duly appointed “general manager,” took no part in carrying on this business or in earning in any way these profits; but carried on the like

business elsewhere, the profits of which he made all his own. So, too, it must be borne in mind that this business could be carried on successfully only by these two defendants and the plaintiff, or some of them, and that it was intended to be so carried on only; that it was not a company which could procure a successful or suitable general manager by merely advertising for one, or indeed in any way but out of these few shareholders.

And, having regard to the character of the work done in the name of the company—mainly contracting for the construction of, and constructing, railways and like extensive works—and the great profits earned, so great that it is perhaps superfluous to say that on all hands the work done has been described as “eminently satisfactory,” it should be needless to say that that work was not, nor was it at all like, a mere director’s service; that it was that of very capable and very successful executive officers such as general or special managers. This was not really denied. From a business-man’s point of view how could it be?

In short, the whole work was the work of these two men, and the earnings were their earnings; the company was in substance merely a name, and its capital but a “cypher” so far as the work and earnings were affected; a cypher for which these two men had no need; their capital and credit were abundantly sufficient without it.

In these circumstances, how is it possible to say, with any appearance of fair play or of business-men’s reason, that these men should not be paid for their services? And, from a lawyer’s point of view, why not? I know of no reason why a day-labourer for a company may not lawfully be its president, and yet receive his day’s wages; nor why a general or other manager may not be a director and yet be paid a salary; we have outstanding instances in the great railway companies of this country. In the case of *Fitzgerald & Co. v. Fitzgerald* (1890), 137 U.S. 98, the rule as to implied contracts between companies and their directors is thus stated by Fuller, C.J. (at pp. 111, 112), in delivering the judgment of the Supreme Court of the United States of America:—

“A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But, in any case, the mere fact that valuable services are rendered for the benefit of a party does not make him liable upon an implied

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promise to pay for them. It often happens that persons render services for others which all parties understand to be gratuitous. Thus, directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an implied promise, it must be shewn, not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circumstances were such that a reasonable man, in the same situation with the person who receives and is benefited by them, would and ought to understand that compensation was to be paid for them."

Words which apply and aptly express the common sense of the business community of this Province on the subject.

If there were nothing more in the case than this, I should have no hesitation in finding that there was a tacit agreement to pay these men, and to pay them the full value of their services.

But there is much more than that in favour of these defendants. It ought to be common ground that a workman is worthy of his hire; and I find it very difficult to understand how the plaintiff, with any degree of reason, can contend that these men are not worthy of theirs: men who won by their skill and energy enormous profits, which the plaintiff, who played the part of a drone in this hive during all these years, shared with them share and share alike; and this too though during these years he too was very busy, but in laying up store for himself only in his own hive. Payment of these men during these years was more in the plaintiff's interests than theirs, for it is inconceivable that they would have gone on earning these profits and practically making a present of them to him, over and above bank interest on the comparatively insignificant amount of his money in the concern, which these defendants could quite as well have carried on, and have done as well, without.

The plaintiff testified that the share which these defendants had in the work carried on by him came to an end in 1908. What could happen then except that his in that carried on by them should end likewise, or else that they should be paid for their services?

The latter course was deliberately and formally taken, and entered in the records of the company in these words: "It was decided that the officers actually engaged in the management of the company should receive a salary to be settled on hereafter, this salary to date from May 1st, 1909:" that was on the 10th January, 1910. And, more than that, this plaintiff, who now urges that these men should have no pay, gave this testimony at the trial of this action:—

"Q. But what led up to the discussion that you speak of after the meeting and what was the discussion? A. Well, I think it was Mr. Hinds' suggestion that they might want a salary, which I did not object to.

"Q. Why should they want a salary any more than you? A. I was looking after some personal work in the west, and they were looking after this work for the Toronto Construction Company.

"Q. What else? A. Mr. Hinds said at that time, 'Well, we are pretty high-priced men, we might want \$25,000 a year,' or words to that effect; and I said, 'Well, I am pretty game;' and he said, 'Well, we will let it stand for the present.'"

In the face of this testimony, and of the fact, as very properly found by the trial Judge, that the decision of the company which I have read was come to at a meeting which was attended by every shareholder, except the nominal one, and was the decision of all, it is assuredly a waste of time to urge that these men were not to be paid for their services—services not in any sense as directors, but as executive officers of the highest class and of exceptional ability, as their earning of profits, instead of making losses, of between one and two millions of dollars, very plainly proves.

Then, being entitled to payment for their services, on what ground are they to be deprived of it? The one ground alleged in the plaintiff's statement of claim is: "The said payments are not justified by any services rendered and are wrongful and fraudulent as against the defendant company, and the said actions of the individual defendants"—in taking steps towards making such payments—"are in breach of their trust and duty as directors of the defendant company and are wrongful and fraudulent as against the defendant company, and any confirmation of the same, as hereinbefore set out, is wrongful and fraudulent as against the defendant company:" but why or how wrongful or fraudulent the plaintiff

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fails to allege or shew, unless it be that the payments were to be made "without the consent of and against the protest of the plaintiff."

In view of the facts which I have set out, it is plain why only insufficient allegations of fraud were made: there were no facts upon which any sufficient allegation could be made; on the contrary, the plaintiff and the company should be estopped from resisting payment of wages well-earned upon their promise to pay. Any such defence is out of the question.

But it was contended here, and at the trial, that, as these defendants had, as directors of the company, been guilty of a breach of duty towards it, in taking for another company a contract which, as such directors, it was their duty to take for this company, they not only forfeited their right to any salary for that year, but also the salary which they had earned in the preceding years.

What happened was this: these men becoming thoroughly dissatisfied, as they well might be, at the plaintiff receiving such large profits out of the sweat of their brows, whilst they got nothing out of his, determined, in the latter part of the year 1911, to bring this uneven partnership to an end, as, of course, they had a right to do, and the only wonder is that they did not do it sooner. They formed a new company—as any one can, almost as a matter of course, and the payment of the fees exacted for the letters patent of incorporation—and then took the next contract—on the 1st day of April, 1912—in the name of this company, instead of that of the old company, in other words, for themselves instead of themselves and the plaintiff. This also they had a perfect right to do, if they had adopted other methods than that which they took; some of which might have been very much worse for the company. It was quite within their power to close its doors at any time by simply declining any longer to carry on business in its name. The company was nothing without them in the capacity of its executive officers; in other words, the moment these men turned their services over to another company or employed them in their own name, this company fell to pieces. It was their standing, experience, and ability, that brought contracts and carried them through, with satisfaction to those who let them, and with great profit to those for whom they were taken. If these men had gone out of the company at any time, as they lawfully might, it must have been

disastrous to it in the sense of virtually ending its life. But they did not go out, nor did they stay in and say, as they might have done, "This company shall not undertake any more contracts;" and so it was held that they should have taken the last mentioned contract in the name of this company, and by the judgment of the Courts they were compelled to treat it as if it had been so taken, and the profits of it have accordingly gone to this company; that is to say: this company has been put in the same position as if no mistake had been made, the company has lost nothing, and the plaintiff has lost nothing, by it. What more can reasonably be asked?

What is asked is this: that because of that error, although full compensation for any loss that might have been sustained by it has been made, these men, who have for the years in question shared their profits with a drone partner, must, at his instance and for his sole benefit, and against the will of every other shareholder, lose all their salaries for the three years preceding the year in which this contract was performed, as well as for the year in which the wrong method of getting out of this company and carrying on their own efforts for their own benefit was taken. If that be the law, I cannot help thinking that there is some ground for some of the metaphors, used by some authors, expressive of its stupidity.

In considering what the law is, upon such a subject as this, it is much better to see whether or not it comes within well-defined and well-known principles than to search for some case which may seem to be applicable and somewhat blindly follow it; and that this case comes within such principles seems to me to be very plain; the principle applicable in the first place being that as well-known and well-defined as that one who fails to perform his contract cannot recover the price which he was to have been paid if he had performed it; nor can he recover anything for any part performance except upon an expressed or tacit promise to pay, founded on a sufficient consideration. That simple rule applies as well to contracts of service as to any other contract; so that, when a servant is lawfully dismissed, before he has earned his wages, he has no lawful claim for payment of part of them; but, if any part of his wages have become payable, misconduct afterwards cannot deprive him of them; a cause of action cannot be discharged in

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that way. But, if he sue for his wages so payable to him, his master can, in these days, meet that claim with a counterclaim for damages; and may, in a proper case, be awarded not only compensation for all his actual loss but also exemplary damages. The failure in performance of the contract must be of a substantial character to be an answer to a claim for the price agreed to be paid upon the completion of it; and if, in a case of hiring and service, the master continues to accept the services of the servant or the full benefit of them, notwithstanding known breaches of the servant's obligations, until the time for payment under the contract comes, he cannot avoid payment, but may have damages for the breaches of the servant's obligations.

Apply that to this case: the company might have had full compensation for all that it lost by reason of these men having taken the 1st April, 1912, contract for their new company instead of for this company; whether it could have had exemplary damages depended on the question whether they were guilty of actual fraud in that act. The former action was brought for the purpose of enforcing all the rights of this company in respect of that legal, quite as much as equitable, wrong. I say "wrong" not because any such wrong has been proved in this case, but because it was adjudged in the other action that such a wrong had been done, and that adjudication estops the parties to this action, who were also parties to that action, from contending otherwise. That action was brought to recover full compensation for that wrong, and that which was awarded in it against these defendants must be taken to have been full compensation; in any case no further damages, under any name, are now recoverable from them for that wrong: at law, under the name of "damages," or in equity under the name of "accounting for profits," they are the same relief.

Before the contract was made, the plaintiff was given notice of the intention to take it just as it was afterwards taken. If he is to be looked upon as the company, as quite inaccurately he has too often been, there were three courses open to him: (1) to discharge—or endeavour to do so—these servants of the company who were thus mistaking their rights, and about to do a wrong to the company, and have insisted upon the contract being taken by this company and performed by its servants, if not by its "general manager;" (2) permit them to go on with the contract, with

notice that they were still deemed to be the company's servants, and that the company would insist upon the contract being treated as theirs and their services rendered for it; and (3) discharge these servants—or endeavour to do so—and recover damages from them or have an accounting in equity, for their wrong.

Substantially the second course was taken; and, that being so, I know of no law, or equity, or case, that can justify a refusal to pay their wages thus earned, and at the same time take the full benefit of their services in taking all the profits they earned. Treating them as still working for this company, in all other respects, and yet to refuse them their wages, and to do this at the instance of the sleeping partner only, against the will of every one else concerned, and four times more concerned than he, would assuredly, as I think, tend to bring the law quite within "Mr. Bumble's" definition.

Now let us turn to some of the cases. In the case of *Tyrrell v. Bank of London* (1862), 10 H.L.C. 26, it was said of the defendant—the appellant—by the Lord Chancellor in the House of Lords (p. 44): "He forgot the first duty of a solicitor in the concealment and falsehood which were practised;" and yet that tribunal decreed that out of the secret profits he had in that manner obtained he should be allowed "the moneys properly expended" by him "in respect of the said hereditaments, including all costs, charges, and expenses incurred by him, and all payments properly made by him in relation to the premises;" the formal order of the Court being, in this respect, in these words: "the money paid by the defendant . . . or by his order, in respect of the said hereditaments, including all costs, charges, and expenses properly incurred by him and all payments properly made by him in relation to the premises."

A few years afterwards, the case of *Salomons v. Pender* (1865), 3 H. & C. 639, was decided by the Court of Exchequer; and in it an agent for the sale of land, being himself the purchaser, was considered not entitled to a commission upon the sale; but Martin, B., referring to a passage read from Story on Agency, which is in these words—"It may be laid down as a general principle, that in all cases where a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation, are to be for the

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benefit of his employers"—said: "But what is meant is that where an account is directed against agents of the proceeds of property which they have sold at a profit, they will be allowed to take credit for their commission."

In the case of *Andrews v. Ramsay & Co.*, [1903] 2 K.B. 635, it was held that the plaintiff was entitled to recover a commission deducted out of the price of property sold by the defendants for him because the defendants had received a secret commission from the purchaser; and this although they had already been compelled, by an action, to pay to him the amount of the secret commission received by him. The Lord Chief Justice, in the first place, based his judgment upon the case of *Salomons v. Pender*, which however was quite a different case and one looking on this point the other way. The plaintiff in that case was not compelled to refund any profit, he had received none except such as may have gone with the land, and that he and the others to whom the land was sold retained; and there were in it the observations which I have read from the report of it. But, at the close of his judgment, the learned Chief Justice put it rather differently thus (p. 638): "But if, as is suggested, there is no authority directly bearing on the question, I think that the sooner such an authority is made the better." But that, as it seems to me, was contrary to the precedent in the House of Lords to which I have referred, as well as that in the Court of Exchequer.

And that case is, plainly, quite different from this, for in this case all that was done was done with the knowledge of the plaintiff, and he chose to stand by and permit it to go on, and then to take the position that the defendants were accountable, just as if they were throughout the servants of this company carrying on the work in question as if it were this company's work, and, with the aid of the Courts, has obtained the same benefit as if actually it had been so; and assuredly that position must be maintained throughout, in regard to wages as well as in regard to profits. The only actual difference is that the new company—that is, substantially, these defendants—relieved this company from all danger of loss, loss which, in such a work, might have been very great. It is assuredly bad enough to have made it a case of "Heads I win, tails you lose," without doing these defendants out of their contribution in, as the learned trial Judge very accurately says, "de-

voting practically their whole time" to the work, as well as their exceptional skill in works of that character, without which not a farthing of profit would have come into being to fight over.

And soon after the decision in the case of *Andrews v. Ramsay & Co.*, the same Court was obliged to take something like a step backward from the new precedent, in the case of *Hippisley v. Knee Brothers*, [1905] 1 K.B. 1, in which it was held that, although the plaintiff could recover the amount of the secret commission, yet the defendants were entitled to their commission for the sale of the goods. The difference between the two cases, in the judgment of the Lord Chief Justice, being that in that case "there was no fraud, but that what was done by the defendants was done under a mistaken notion as to what they were entitled to do under the contract:" whereas in the other case the defendants had "acted with downright dishonesty" (pp. 7, 8).

Following cases, without great regard for the principles involved, may well be, sometimes, will-o'-the-wisp methods, leading to quagmires: as, for instance, following the earlier of these two cases in ignorance of the latter, or before it was decided; and I venture to express my view that if plain common law rules be applied to such cases as these a right conclusion can be reached without much perplexity.

But, assuming the question to be one of dishonesty and severability, in this case: what ground can there be for finding that these defendants, men of unblemished standing and of unusual skill and knowledge in their calling, and men capable of earning the great profits which for years they earned for this company, were in any sense dishonest? I am bound to say that if I should apply that ugly word to them I should deem myself without excuse, much less justification. One unquestionable fact alone would close my mouth very firmly. Six Judges of the Supreme Court of Ontario, men familiar with such things as those involved in this case and with men and things in general in this country, unanimously, not only adjudged that these defendants were not guilty of any dishonesty, but, indeed, were quite within their lawful and just rights in breaking away from this company and in taking the contract under discussion for the new company. Am I to say, in the face of that fact, not only that that which was done was without lawful right but was also dishonest, actually fraudulent; is any one, no

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matter who he may be and whether in high or low degree, to say it? Again, how can it be termed dishonest or an actual fraud when only the manner of doing it can be found fault with; when the same thing, and worse, so far as the plaintiff's interests are concerned, could have been quite as easily, and quite as quickly, lawfully accomplished? It is useless to say that it was done to forestall the plaintiff or this company. The company was but a name, and the plaintiff was entirely "out of the running," for any such contracts. These defendants and their experience, business stability, and ability, were the sole factors. Their only difficulty could have been in regard to what is commonly called the "plant"—the tools and implements—needed in the work, and that they could have converted to their own use, or else have purchased another.

Whether they acted dishonestly or not is a question which we have to determine upon the evidence adduced in this case, and upon that alone. The question was not one material to the issue in the other action; and so no finding in it could relieve us from that duty, if there had been one, of which I can find no evidence. It ought to be needless to say, that the judgment in the other action needed no fraud, that is, actual fraud, to sustain it; "constructive fraud" was quite enough; as also that there was no fraud of any character, but merely a breach of the servants' contract with their employers. But, for those who long for a case for everything, I refer to *Nocton v. Lord Ashburton*, [1914] A.C. 932, and to the very apposite words of the Lord Chief Justice of England in the case of *Hippisley v. Knee Brothers*: "I am satisfied that there was no fraud, but that what was done by the defendants was done under a mistaken notion as to what they were entitled to do under the contract." So, here, I am more than satisfied that there was no fraud; that that which was done by these defendants was done in the belief that it was their lawful right to do it. We must not treat them as imbeciles; they are men of firm standing in the community and of quite as much reason as most of us; and, that being so, why should they attempt to do anything but that which was lawful and right? What was to be gained by it? Not this contract, because this company, without them, could be no impediment in their way to get it. And, dealing with an equally shrewd man of business, like the plaintiff, no one of intelligence would lay

himself open to a certain attack by him; even if there were no other way of attaining the object lawfully and safely.

It is true that the learned Judge who spoke for the Judicial Committee of the Privy Council in the other case, did make use of some words which, divorced from all else that was said by him, give some ground for thinking that he thought these defendants had acted dishonestly; but, in the first place, it should be observed that there is not a word to indicate that the learned Judge thought that in doing that which he thought they did, or omitting that which he thought they omitted, they were not acting in the honest belief that they were in all things within their lawful right. But, however that may be, what have we to do with the learned Judge's views upon the subject except in so far as they were needful to support the judgment pronounced? It would be an extraordinary, and a lamentable, thing if the reasons of a Judge expressed in one case were to be treated not only as evidence but conclusive evidence upon a question of fact to be tried in another case, brought for a different purpose; and that no matter how experienced or inexperienced, or of how high or low degree, such a Judge might be. I say these things because of the persistent tendency to argue this appeal as if the reasons of the learned Judge, to which reasons I have referred, were uncontrovertible and conclusive evidence in this case. And I may add again this: that I can hardly deem it possible that any one should say that these men knew they were acting wrongly—contrary to our law—in the face of the opinions of the six Judges unanimous in considering that they were in truth acting rightly and quite within the law.

I find no evidence of fraud on the part of these defendants; nor indeed on the part of the plaintiff, in having taken part in inducing these men to devote three of the best years of their lives in the service of this company on the promise of payment for such service, and then seeking to deprive them of payment to any extent; his misconduct, thus, is not fraud, it is just the outcome of resentment more aptly called spite, not the desire of gain in money, for I am able still to take him at his own estimation: "Well, I am pretty game;" not dishonesty but spite drives, and spite is sometimes a vicious driver; it is said to drive some men to "bite off their noses to spite their faces;" but that is not this case, rather it has driven the plaintiff to bite off the noses of his *quondam*

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familiar friends and partners, or, more accurately speaking, to put them, with much aid from this Court, distinctly out of joint. It is not fraud, but ill-feeling, that has brought all these evil things—including tens of thousands of dollars thrown away in law costs—to pass.

But, assuming also that it is necessary to sever the wages for the three years in question from the transaction which was the subject of the other action, in order to sustain the right of these defendants to payment, there seems to me to be no difficulty in that respect in the defendants' way. "If it appear from the agreement to have been the intention of the parties that the servant should be remunerated, but the amount of his remuneration was not settled, he will be entitled to recover upon the *quantum meruit* the fair value of his services." The agreement here was to pay a salary; that is a periodical payment, monthly, quarterly, or yearly; so that at the furthest a cause of action for such salary arose yearly; the amount to be ascertained by Judge or jury if the parties had not agreed upon it. And such a right of action could not be discharged by any subsequent misconduct. Need I refer to such cases as *Taylor v. Laird* (1856), 1 H. & N. 266?

It is true that in the third year, a month before its termination, the contract in question was taken, but it was taken openly, after full notice to the plaintiff of the manner in which it was to be taken: and so, in regard to this year, the answer to any objection to payment of the salary assuredly is this: the company might have discharged these servants if it saw fit to do so, assuming that they had done wrong in taking the contract as they did; but the company—that is, the plaintiff—for the best of self-interested purposes did not do so; to do so would have meant the loss of the contract: the plaintiff was not able to carry it out, no one but these defendants could; so that the only course for the plaintiff to pursue in order to get any benefit from it was, in effect, to require these servants to continue working for the company earning the profits of the contract for it; and that, with the aid of the Privy Council, has been effected; and so the salary for that year was earned and should be paid.

Whilst it is right to discountenance unfaithful conduct on the part of all who serve, it is quite as important to avoid making, lightly, charges of dishonesty against them. It is to be borne in

mind that those who occupy and have always occupied a master's position may have the prejudices of a one-sided experience; and that it is very easy to carry such prejudices to unjustifiable extremes. No great esteem can be had for those who are so prejudiced as to deem the honest gardener who accepts a gift of a jack-knife from an honest seedsman, with whom the gardener's master deals, worthy only of a bad character. Fortunately, I think, the extreme notions on this subject which may have prevailed to some extent in England have not overrun this country yet; and those who are too ready to adopt them should remember that there are others besides gardeners who accept gifts even of knives when they can be had. The notion can be carried to lengths which might be termed ridiculous if it were not for the great injustice it may do. It is a self-evident mistake to be too pronouncedly self-righteous; to be too searchful for the "mote:" so too it is a mistake for the drone to be too critical of the working bee.

Besides separation, as I have stated, in regard to time, the transactions in question were entirely separable and separate in quantity and quality. Each contract was a separate and complete transaction in itself. Wrong done, or mistakes made, as to the one, had no effect upon any other. In regard to all other transactions, these defendants' conduct, as I have said, has been considered "eminently satisfactory" on all hands. How then can it be said, reasonably, that their mistake in this transaction is so inseparable from the other eminently satisfactory transactions as to vitiate all? I should have thought that in both respects the transactions were as easily separated as any under any circumstances could be.

And therefore, even if otherwise these defendants would have forfeited their three years' earnings, I should be clearly of opinion that that wrong was avoided by the severability of the vitiated transaction. And, before leaving this subject, it may be well again to say that each of the two later cases to which I have referred was a case of secret profit, the dishonesty attributed in the one case was in the secrecy regarding the profit. This case is different in all its features.

And, upon yet another ground, right, as it seems to me, can be done.

I see no reason why the company might not, as it did, make good the claims of these defendants for their salaries for the three

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years in question. In the first place, it was not a gift in any sense; it was but carrying into effect the "decision" of this company, and of every one in any way concerned in it, expressed in the records of the company, on the faith of which the services were rendered, and without which, or some better arrangement, the company would have come to an end then. Why might not the company do this; indeed what excuse could it have for not doing it, when a full recompense had been exacted from these defendants for their mistake regarding the contract of the 1st April, 1912? And why not, even if that act had not been merely a mistake as to their legal rights? What law, or equity, can there be, entitling a company to exact a great penalty or forfeiture beyond that which has been paid, and has put it in precisely the same position as if no wrong had been done? There can be none.

But, even if it had been in legal strictness only a gift, why might not this peculiar company, in the peculiar circumstances of the case, make it? Common decency required that it should be done: that these men, who had devoted substantially their whole time in the interests of this company for three years, for others who did nothing as well as for themselves, should receive a fair recompense, law or no law, equity or no equity, but common decency and common honesty, in a sense, prevailing. With more than a million and a half dollars of profits, it would be foolish to say that it came out of the capital; if that would make any difference, if really the capital is not as much the shareholders' as the profits are, if, in truth, the question is not one of fraud, upon which question whether out of capital or earnings might be important. The Privy Council have treated it in that way. Oppression of a minority by an interested majority; certain directors holding a majority of votes making themselves a present. A case of fraud. That finding is of course not binding on us; it was in respect of an entirely different action of the company which took place several years before that in question. Our duty is to find, quite independently of that finding, whether the action of the company, now in question, was fraudulent. And, as to that, let me point out that it was not a case of directors making a present to themselves; it was an act carried by the only independent shareholders and by them unanimously. Exclude the votes of these defendants who benefit by the action of the company; and,

if that be done, for equally good reasons the spiteful votes of the plaintiff should be rejected; the result being 504 independent votes for and no vote against payment. Or include the plaintiff and exclude these defendants, then there is a majority of four in favour of standing by the promise to pay on the faith of which the services were rendered. There is no evidence of any character that George M. Deeks and Mrs. Deeks did not vote in a fair and conscientious manner, and neither had any personal interest in voting as they did: voting the other way was voting money into their own pockets, but money which they had promised to others, and which they might well think it dishonest to take back by breaking that promise. There is no evidence that these shareholders voted any differently because those defendants were not strangers to them.

To say that the claim is a mere afterthought, an outcome of the loss of the other action, is to forget or ignore the promise to pay in 1910, on the faith of which the work was done, as well as to overlook entirely the testimony of the plaintiff of his expressed willingness, in 1910, not only that these defendants should be paid, but that they should be paid the exact amount which they claim. There was nothing extraordinary in letting the matter stand during the other litigation; and, whether there were or not, that could not alter the legal rights of the parties or give any kind of justification for a contention that the claim is altogether an afterthought.

If we do not forget the peculiar kind of company which this company was, and the peculiar circumstances of the case, we shall find no semblance of fraud in any action of this company in respect of the matters in question; nor anything like an interested majority oppressing an innocent and helpless minority. In my opinion, the action of the company in question was lawful and right. Indeed, as strong words have been applied to the conduct of these defendants, it may be but fair to them for me to add, that, in my opinion, any other action on the part of the company, in view of its promise, its decision, in 1910, would have been contemptible.

That the amount at which the salary was fixed by the company in 1916 was not excessive is well proved by the circumstantial evidence: the character and volume of the work done; the great profits earned and the remuneration given to the subordinate officer; and, in addition to that, there is the very satisfactory

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testimony of the witness Mr. Jackson; to which also may be added the plaintiff's expression of willingness to pay the exact amount, in the year 1910; and there is no evidence to the contrary. But for the bitterness of the quarrel between these former friends, there hardly could have been any objection to the claims of these two defendants in this respect, from one who expressed his willingness to pay the exact amount in question, and who, whilst a sleeping general manager, received in profits probably one thousand per cent. on his investment—his partnership with these two defendants—profits won altogether by their energy and ability.

I am clearly of opinion:—

1. That these two defendants have a good cause of action against the company, under the expressed undertaking of 1910, for more than the amount which they claim.

2. That they have also a lawful right to the money in question under the action of the company in 1916. And, if these things were material:—

3. That, in taking the contract of the 1st April, 1912, these defendants believed that they were doing no more than they had a lawful right to do; and as—now—seven Judges of this Province also think they had a lawful right to do.

4. That that contract was entirely separate from those out of which their right to remuneration in question arose.

5. That, at latest, at the end of each year a cause of action arose for the salary which these men were to be paid; and that no misconduct after that could displace it.

6. That, the company having abstained from dismissing these defendants from office and taking over the work itself, and having, on the contrary, claimed and had the benefit of this contract as fully as if it had been performed by the defendants for that company and as its servants, it is unjust and inequitable to treat them as discharged servants disentitled to their wages; and there is no power in this Court to impose a penalty, except by way of exemplary damages; that otherwise the true measure of damages is the measure of the plaintiff's actual loss: see *Hamilton Gas and Light Co. and United Gas and Fuel Co. v. Gest* (1916), 37 O.L.R. 132, 31 D.L.R. 515, and the cases therein referred to. That though there may be cases in which a dismissed servant cannot recover wages, and may be compelled to pay over profits to his

master, quite irrespective of any question of dishonesty, this case is obviously not such an one even in respect of salary for the year not now in question.

7. And that, in reason, and on the authority of such cases as *Tyrrell v. Bank of London* and *Salomons v. Pender*, ordinarily all that is honestly owing to a servant, honest or dishonest, should be allowed to him on his accounting for, and paying, all lawful rights and claims of his master; that, however wrong it may be for a servant to "rob" his master, that cannot make it right for the civil courts to "rob" the servant for the benefit of the master

8. That the case is obviously one of master and servant, or, if any one prefer it, of company and executive officer; and that, if it were not, if it were only of directors' fees, these defendants are entitled to be paid the "salary" in question, because of the promise of every shareholder of the company, in 1910, to pay it, reaffirmed at the shareholders' meeting in 1916.

9. And that, without at all relying upon recent days' extravagant notions of the capacity of Ontario companies—see *Edwards v. Blackmore* (1918), *ante* 105—the action of the shareholders in 1910 and 1916 was *intra vires* of the company; and that neither was fraudulent, and so both are binding, though either would be enough: see *Dominion Cotton Mills Co. Limited v. Amyot*, [1912] A.C. 546, 4 D.L.R. 306.

The learned trial Judge was, in my opinion, quite right in his conclusions; and, accordingly, I would dismiss this appeal; but, as the other members of this Court are of a contrary opinion, it must be allowed, and the company must be restrained from paying and these defendants from receiving the money in question; and, according to the ordinary rule, costs follow the event.

Appeal allowed; MEREDITH, C.J.C.P., dissenting.

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[IN CHAMBERS.]

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INGERSOLL PACKING CO. LIMITED v. NEW YORK CENTRAL AND
HUDSON RIVER R.R. CO. AND CUNARD STEAMSHIP CO.
LIMITED.

Writ of Summons—Service on Foreign Corporation—defendant by Serving Person in Ontario—Agent with Limited Powers—Rule 23—Transacting or Carrying on Business in Ontario—Order of Judge in Chambers Refusing to Set aside Service—Motion for Leave to Appeal—Rule 507.

An action was brought in the Supreme Court of Ontario against a railway company and a foreign steamship company for breach of duty in or about the carriage of goods. The writ of summons was served upon B., in Toronto, Ontario, as representing the steamship company. B. was the agent or representative in Toronto of a Canadian company, having its head office in Montreal, and that company was the agent in Canada of the foreign steamship company. Neither B. nor the Canadian company had anything to do with the arrangements for the shipping of the goods in respect of which the action was brought. It appeared that the agency of the Canadian company for the steamship company was of a limited kind: it did not make contracts with shippers or passengers except on specific instructions, but received requisitions and forwarded them to the steamship company in New York:—

Held, by MASTEN, J., in Chambers, that the Canadian company, through B., transacted or carried on some business in Ontario for the steamship company, within the meaning of Rule 23, and therefore the service upon B. for the company was good service.

Difference between Rule 23 and the English Order IX., Rule 8, pointed out. *Okura & Co. Limited v. Forsbacka Jernverks Aktiebolag*, [1914] 1 K.B. 715, distinguished.

Held, by RIDDELL, J., in Chambers, refusing a motion (under Rule 507) for leave to appeal from the order of MASTEN, J., that there was no good ground to doubt the correctness of the decision.

AN appeal by the defendant the Cunard Steamship Company Limited from an order of the Master in Chambers dismissing the appellant company's application to set aside the service of the writ of summons upon one E. T. Boland, for the appellant company, a foreign corporation.

February 25. The appeal was heard by MASTEN, J., in Chambers.

J. H. Moss, K.C., for the appellant company.

H. S. White, for the plaintiff company.

March 1. MASTEN, J.:—Appeal by the defendant the Cunard Steamship Company Limited from an order of the Master in Chambers dated the 27th June, 1917, dismissing the appellant company's application to set aside the service upon one E. T.

Boland, an employee of the Robert Reford Company Limited, in Toronto, of the writ of summons, on the ground that the appellant company is a foreign corporation, not present in Ontario, and not carrying on business there, and that neither E. T. Boland nor the Robert Reford Company Limited represents the appellant company in Ontario in such a manner as to permit service of the writ of summons on the said appellant company by serving the writ on E. T. Boland.

The action is for breach of duty in or about the carriage of bacon. The appellant the Cunard Steamship Company Limited has no place of business of its own in Ontario; and, so far as it acts in Ontario, it acts through the Robert Reford Company Limited, with which it has had permanent relations for many years.

The Robert Reford Company Limited is a corporation incorporated under the laws of Canada, with power to carry on its business throughout Canada as a general merchant and commission agent, also to carry on business connected with lines of steamships and other ships and vessels. The company conducts an extensive business on its own behalf along the general lines indicated by its charter, and it owns shares in several companies operating lines of ocean steamships, but not in the Cunard Steamship Company Limited; also it represents, as agent at Montreal, several other steamship companies and lines.

E. T. Boland is the agent and representative in Toronto of the Robert Reford Company Limited. He is employed at a salary paid by that company, and carries on business for it at 50 King street east. As an employee of the Reford company, he acts as agent in Toronto for the Cunard Steamship Company Limited, in the manner and to the extent hereinafter indicated. The services rendered by him to the Cunard Steamship Company Limited are paid for by a commission on the business done, and in addition by an annual allowance of \$2,000 to the Robert Reford Company Limited, by the Cunard Steamship Company Limited, for services rendered and disbursements made by it at Toronto and elsewhere throughout Canada. Mr. Boland has nothing to do with the fixing of rates, prices, or terms, either on freight or passenger business of the Cunard company.

The Robert Reford Company Limited pays all its own office and management expenses in the Dominion of Canada. Its office

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in Toronto is maintained exclusively by itself, and not in any way by the defendant the Cunard Steamship Company Limited, all rents, salaries, and other expenses of the Toronto office being paid by the Robert Reford Company Limited, except in so far as the commission and the allowance of \$2,000 above mentioned may be said to assist in paying the expenses of the Toronto office.

The method in which the Robert Reford Company Limited transacts business for the Cunard Steamship Company Limited is as follows. If a person comes to the office seeking to obtain a passenger ticket or a freight contract, Mr. Boland, as representative of the Reford company, communicates with the Cunard Steamship Company Limited, in New York, or in certain cases with the Montreal office of the Reford company, and ascertains whether any space is available and the rate at which the business can be done; he has no power to allot space nor to fix the rate, nor has he any power to modify or vary the rates and terms on freight or passenger contracts.

It is alleged that the claim sued on in this action arose in connection with a shipment of freight over one of the said defendant's services operating from New York and that the Robert Reford Company Limited had nothing to do with the arrangements for the shipment of the said freight or otherwise with the said transaction. William Inkermann Gear, vice-president of the Robert Reford Company Limited, was cross-examined on his affidavit filed in support of the application, and in that cross-examination confirms the above statements and makes certain additional statements. Among other things he says:—

"Q. 41. Do you advertise? A. The Cunard Steamship Company advertises.

"Q. 42. They pay for the advertisements? A. Yes.

"Q. 43. And do they refer in the advertisements to your firm as their agent in Toronto? A. Yes.

"Q. 45. Do you do any advertising at your own expense? A. No."

In the advertising material which is produced, the public are directed to apply for further information (among other places) to the Robert Reford Company Limited, No. 50 King street east.

"Q. 70. When you obtain confirmation, as you call it, from the New York office of the Cunard company, what do you then

do with the shipper? A. We give the shipper a contract as an agent."

That contract, as appears in another part of the examination, is signed, for the Cunard Steamship Company Limited, in the name of the Reford company. The Reford company also sells money-orders for the Cunard Steamship Company Limited, similar to the money-orders issued by express companies.

In the telephone-book, under the name of "Cunard," appears the following: "Cunard Steamship Line—General Freight and Passenger Agents, 50 King Street E.," which is the office of the Reford company, and that item in the telephone-book is paid for by the Cunard company.

"Q. 181. This contract is made by you as agent for the Cunard Steamship Company? A. We sign that, 'Robert Reford Company per——agent.'

"Q. 182. What do you mean by 'agent' in a case such as you have mentioned—as agent for the Cunard Steamship Company? A. Only for that one shipment. . . .

"Q. 192. Do you know whether the Cunard Steamship Company is referred to in the Toronto street-directory? A. I don't know; I presume it would be; I don't know.

"Q. 193. Why is that? A. I must refer you to Mr. Boland.

"Q. 194. You say you presume it would be—why do you presume it would be? A. Because I think that once on a time he asked me if he should do it and I said, 'Yes.'

"Q. 195. Who? A. Mr. Boland.

"Q. 196. How long ago? A. It might be 20 years ago for all I know; I don't remember.

"Q. 197. 'Cunard Canadian Service, Robert Reford Company, agents, 50 King street east; Cunard Steamship Company Limited, W. H. Roxton, Immigration agent, 114 King street west; Cunard Steamship Company Line, Robert Reford Company, agents, 50 King street east.' Have you been aware that that has been carried into the directory for a great number of years? A. I presume so."

On the argument before me the case of *Okura & Co. Limited v. Forsbacka Jernverks Aktiebolag*, [1914] 1 K.B. 715, and the case of *Thames and Mersey Marine Insurance Co. v. Societa di Navigazione a Vapore del Lloyd Austriaco* (1914), 30 Times L.R. 475, were relied upon and discussed.

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Under the principle laid down by the English Court of Appeal in the *Okura* case, the foundation of the right to effect service on a foreign corporation rests on the presence within the jurisdiction of the party to be served. In his judgment Lord Buckley says (pp. 718, 719):—

“The answer to that question depends on whether the defendants can be found ‘here’ for the purpose of being served. In one sense, of course, the corporation cannot be ‘here.’ The question really is whether this corporation can be said to be ‘here’ by a person who represents it in a sense relevant to the question which we have to decide. The point to be considered is, do the facts shew that this corporation is carrying on its business in this country? In determining that question, three matters have to be considered. First, the acts relied on as shewing that the corporation is carrying on business in this country must have continued for a sufficiently substantial period of time. That is the case here. Next, it is essential that these acts should have been done at some fixed place of business. If the acts relied on in this case amount to a carrying on of a business, there is no doubt that those acts were done at a fixed place of business. The third essential, and one which it is always more difficult to satisfy, is that the corporation must be ‘here’ by a person who carried on business for the corporation in this country. It is not enough to shew that the corporation has an agent here; he must be an agent who does the corporation’s business for the corporation in this country. This involves the still more difficult question, what is meant exactly by the expression ‘doing business?’”

The learned Lord Justice then discusses the cases which had been cited on the argument before him, and, after summarising the facts of the case under consideration, concludes thus (p. 721):—

“In an affidavit of the defendants’ managing director he states that Svedburgs have no general authority from the defendants to accept offers, and every offer is submitted fully to the defendants and can only be accepted by Svedburgs as the defendants’ agents when they receive the defendants’ express authority in each particular case. These being the facts, 101 Leadenhall street is really only an address from which business is from time to time offered to the foreign corporation; the question whether any particular business shall or shall not be done is determined by the foreign

corporation in Sweden and not by any one in London. In my opinion the defendants are not 'here' by an *alter ego* who does business for them here, or who is competent to bind them in any way. They are not doing business here by a person but through a person. That person has to communicate with them, and the ultimate determination, resulting in a contract, is made not by the agents in London, but by the defendants in Sweden."

His conclusion is that the service should be disallowed.

In the same way Lord Justice Phillimore, at p. 722, says:—

"If a foreign corporation can be said to be 'here,' its officer can be served with a writ. But a foreign corporation may be both 'here' and 'there,' and in this connection Lord St. Leonards in *Carron Iron Co. v. Maclaren* (1855), 5 H.L.C. 416, at p. 459, spoke of the possibility of a corporation having two domicils, and in other cases Judges have spoken of corporations having two residences; both of which expressions have been criticised. The criticisms appear to me to be somewhat captious, for though the expressions 'domicil' and 'residence' when used with reference to a corporation may not be quite accurate, they are useful metaphors as indicating what is intended, and there is no doubt that a corporation can in a sense be said to be in two places at once though an individual cannot. But a foreign corporation cannot be said to be 'here' unless there are facts from which it can be inferred that, like an individual, it is residing here, and in the case of a trading corporation residence means the carrying on of its business. In determining this question the Court ought in my opinion, as Lord Coleridge, C.J., said in *Grant v. Anderson*, [1892] 1 Q.B. 108, at p. 112, to have regard to the broad principles of international comity which in questions of jurisdiction must always be assumed to underlie the rules of Court or the enactments of Parliament."

And at p. 724 he says:—

"The important distinction between the two cases is that in the *Saccharin Corporation* case,* the agent in London had authority to enter into contracts on behalf of the defendants without submitting the orders to them for their approval; whereas in the present case the agents have not that authority, their duty being

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merely to submit the orders to the defendants; and until they have signified their approval no contract can be entered into. In these circumstances it seems to me impossible to say that the position of the defendants is in any way analogous to that of a person residing or a firm carrying on business in this country."

Under the English Rule the question is, whether the company is exercising judgment and making determinations regarding this business at some place within the jurisdiction, and the cases to which I have referred make it plain that the mere receipt and transmission of the negotiations pro and con, without any power to the agent or representative to act except on specific instructions, is not transacting business within the jurisdiction so as to bring the foreign corporation "here." In other words, the English principle is bottomed on this: that the foreign corporation must be "here," that it can only be "here" if it has a branch or representative here who can do things—not a mere conduit-pipe to receive proposals and report answers.

If the appeal fell to be determined under the provisions of the English Rules of Practice, Order IX., Rule 8, I would be of the opinion that the defendant the Cunard Steamship Company Limited did not carry on business within the Province of Ontario in such a way as to permit of service being effected on the Robert Reford Company or its representative here. But that does not conclude the case, because our Rule 23 appears to me to go further than the principles of the decisions enunciated in England.

As pointed out by the late Chancellor in the case of *Wagner v. Erie R.R. Co.* (1914), 6 O.W.N. 386, the words of our Rule 23 are large and comprehensive; not only so but they are much more specific than the English Order IX., Rule 8, for, after declaring that "A corporation may be served with a writ of summons by delivering a copy to . . . the clerk or agent of such corporation or of any branch or agency thereof in Ontario," it proceeds as follows:—

"Any person who, within Ontario, transacts or carries on any of the business of, or any business for, any corporation whose chief place of business is without Ontario, shall, for the purpose of being served as aforesaid, be deemed the agent thereof."

No words remotely corresponding to these are to be found in the English Rule. Whether or not our Rule goes beyond the

principles of international comity, and whether full effect will be given in a foreign jurisdiction to any judgment recovered here, under such service, is something which is not pertinent to the present application, which I have not considered, and upon which I express no opinion.

Nothing would be gained by a critical discussion of the words of the Rule which I have just quoted; but it seems plain to me, upon the best consideration that I can give to the case, that our Rule contains a categorical direction which I am bound to observe, and that, under the facts as I have stated them above, the Robert Reford Company Limited has been acting as agent in Ontario for the defendant the Cunard Steamship Company Limited for a substantial length of time; that it has carried on its operations as agent at a fixed place of business in Toronto; and, using the words of our Rule, that the receipt by the Reford company of requisitions for passenger tickets and for freight contracts, the transmission of these to the superior officers of the Cunard company in New York, Montreal, and Liverpool, the receipt by the Reford company of answers to such communications, and the communication of these answers to the customer, and the signing, when accepted, of a contract on behalf of the Cunard Steamship Company Limited, coupled with the payment of a commission for these services and supported by the advertisements to which I have referred, make it plain that the Robert Reford Company Limited, in what it does, is carrying on some business for the Cunard Steamship Company Limited.

The question is undoubtedly one of fact, and it is for that reason I have set out the facts somewhat fully in this judgment.

The result is that, in my opinion, the Robert Reford Company Limited must, for the purposes of serving the writ of summons in this action, be deemed to be the agent of the defendant the Cunard Steamship Company Limited; and, therefore, under Rule 23, a person upon whom the writ of summons may be served within the jurisdiction.

The appeal will therefore be dismissed; costs in any event to the plaintiff company on final taxation.

The defendant the Cunard Steamship Company Limited moved (under Rule 507) for leave to appeal from the order of MASTEN, J.

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March 19. The motion was heard by RIDDELL, J., in Chambers.
The same counsel appeared.

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March 20. RIDDELL, J.:—A motion for leave to appeal from the order of Mr. Justice Masten dismissing an appeal from an order of the Master in Chambers refusing to set aside service of the writ of summons herein.

I have in several cases—the most recent being *Goderich Manufacturing Co. v. St. Paul Fire and Marine Insurance Co.* (1918), 13 O.W.N. 443—pointed out the prerequisites for such a motion to succeed. One of them is that there should appear to the Judge applied to for leave, good ground to doubt the correctness of the decision from which it is desired to appeal.

In the present instance I entirely agree with the very careful judgment of my brother Masten—consequently, however important the matter may be, the motion must fail.

The costs will be to the plaintiff company in any event of the action.

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[IN CHAMBERS.]

March 4.

RE CALEDONIA MILLING CO. v. JOHNS.

Division Courts—Jurisdiction over Indian—Order for Committal under Judgment Debtor Procedure—Contempt of Court—Execution—Division Courts Act, secs. 190 et seq.—Indian Act, sec. 102—Exemption—Powers of Provincial Legislature—British North America Act, sec. 91 (24).

The provisions of secs. 190 *et seq.* of the Division Courts Act, R.S.O. 1914, ch. 63, relating to the imprisonment of debtors, are not intended to apply to Indians.

An Indian who has no property other than what is, by virtue of sec. 102 of the Indian Act, R.S.C. 1906, ch. 81, exempt from seizure under execution, cannot be committed to gaol by a Division Court Judge, after examination as a judgment debtor, even though the Judge be of opinion that the Indian has sufficient means and ability to pay the debt: the Indian Act preventing the judgment creditor from taking the assets of the Indian in execution, they cannot be reached indirectly.

There can be no contempt in withholding that which is by law exempt from seizure; and the person of an Indian—a ward of the Dominion Government and subject to the legislation of the Dominion Parliament by the British North America Act, sec. 91 (24)—cannot be taken in execution under a provincial statute.

MOTION by the defendant in a Division Court action for an order prohibiting further proceedings against him, as a judgment

debtor, in the Division Court, on the ground that he was an Indian owning no property outside of his reserve.

February 5. The motion was heard by MIDDLETON, J., in Chambers.

A. L. Baird, K.C., for the defendant.

H. Arrell, for the plaintiffs.

March 4. MIDDLETON, J.:—On the 4th March, 1917, judgment was pronounced against the defendant in the Division Court for \$164.22, and on the 23rd November he was examined as a judgment debtor, and on the 12th December the Division Court Judge, being of opinion that the defendant had sufficient means and ability to pay the debt, though his property was not liable to seizure by reason of the provisions of sec. 102* of the Indian Act, R.S.C. 1906, ch. 81, made an order for his committal to gaol for 40 days.

This motion was then made for prohibition, the defendant not being taken into custody, by arrangement, pending the hearing of the motion.

The Dominion statute prevents the execution creditor taking the assets of this Indian in execution; but the Division Court Judge in effect says, "Unless you voluntarily give to the judgment creditor that which is by law exempt from seizure under the judgment, you must undergo imprisonment." This is in effect getting at exempt assets in this indirect way.

If the proceedings are in any way regarded as based on contempt, there can be no contempt in withholding that which is by law exempt from seizure.

If the proceedings are in the nature of execution against the person—then the execution creditor is again in trouble. The Indian Act has not given any right to take the person of an Indian in execution. Certain of his property may be taken; but the Indian is, by the British North America Act, sec. 91 (24), subject to the legislation of the Dominion, and is a ward of the Dominion Government, and cannot be taken under the laws of the Province.

*102. No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation. . . .

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I would not construe these provisions (sec. 190 *et seq.**) of the Division Courts Act, R.S.O. 1914, ch. 63, as intended to apply to Indians. I cannot think that the Province intended to confer upon the Division Court Judge any power, directly or indirectly, to interfere with Indians.

For these reasons, the prohibition must be granted. Costs may be set off *pro tanto* against the debt.

*By sec. 191, "if it appears to the Judge, by the examination of the party or by other evidence that he . . . (e) had, when or since judgment was obtained against him, sufficient means and ability to pay the debt or damages or costs recovered against him, either altogether or by the instalments which the court, in which the judgment was obtained, ordered, without depriving himself or his family of the means of living, and that he has wilfully refused or neglected to pay the same as ordered, the Judge may order him to be committed to the common gaol of the county in which he resides or carries on business, for any period not exceeding 40 days."

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RE MITCHELL.

Will—Construction—Gifts to Children—Gifts over in Event of Children Dying without having Received their Portions—Contest between Executors and Children of Deceased Child of Testator—Effect of Divesting Clause—Intention of Testator—Period of Division—Discretion of Executors.

The testator, dying in 1887, by his will set apart his house as a home for his wife and family, and then gave all his estate to his executors in trust to convert and use for the maintenance of his wife and family and to pay certain sums to his sons, and, at such time after the expiration of five years from his decease as might seem advisable to the executors, to divide among all his children, share and share alike, all his estate, save such portions as the executors might retain to provide from the interest for the wife and family residing in the homestead, any balance of income being divided yearly among all his children. The will further provided that on the death of the widow the income should be divided until the time for division previously referred to; and "in case any of my children should die without having received his or her portion . . . and leaving issue him or her surviving at the time a division of the estate shall be made among my children the child or children of such of my children so dying shall represent and receive their deceased parent's share but if any of my children should die leaving no issue him or her surviving the share or portion herein given . . . to such child shall revert to and become part of my estate and be equally divided among all my surviving children."

The executors kept the estate intact until the widow died (in 1917 or 1918), and after her death paid over to the executors of a son, who had died in 1907, leaving children, a sum representing part of his share in his father's estate:—

Held, that the children of the deceased son took under the will of their grandfather, whose executors ought to have paid to those children the sum aforesaid. The gift was to the children of the testator, subject to be divested in favour of the child or children of such of the testator's children as should die before the actual receipt of their shares, leaving children surviving.

Where the testator has intended the gift over to take effect, and there has not been actual payment, effect must be given to that intention.

Kirby v. Bangs (1900), 27 A.R. 17, 29, and *Johnson v. Crook* (1879), 12 Ch.D. 639, followed.

MOTION by the executors of the will of William James Mitchell, deceased, for the opinion and advice of the Court as to the disposition of moneys which had come to their hands as part of the estate of James Mitchell, the father of William James Mitchell. The father died in 1887, and the son in 1907.

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February 5 and 8. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

David Henderson, for the applicants.

A. G. F. Lawrence, for the children of William James Mitchell.

F. W. Harcourt, K.C., Official Guardian, for the grandchildren of William James Mitchell and all those interested in upholding the contention that William James Mitchell, and not his children, took under the will of James Mitchell.

March 4. MIDDLETON, J.:—James Mitchell, who died on the 4th April, 1887, by his last will directed, in certain events, a division of his estate among his children, and provided that, in case any of his children should die without having received his portion, the issue of this child so dying should take the parent's share.

William James Mitchell died on the 29th October, 1907, leaving issue. Since his death, the executors of his father's will have paid over to his (the son's) executors \$24,500 as part of his share in his father's estate.

By the will of William James Mitchell, his children (subject to certain minor provisions) take a life-interest only, and the estate is to be divided among his grandchildren *per stirpes*.

The children now contend that they take under the will of James Mitchell, and that the money in question ought not to have been paid to the executors of their father. If this is right, they take absolutely, and defeat the settlement made by the will of William James Mitchell.

I directed the Official Guardian to be notified, and appointed him to represent not only the grandchildren of William James Mitchell, but also all those who are interested in upholding the contention that the son William James, and not his children, took under the first will. All the other children of James survived the distribution, so no others are concerned.

The will of James Mitchell bears date the 31st December,

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1875, and there is a first codicil dated the 27th October, 1881; a second codicil of the 18th May, 1886; and a final codicil of the 30th October, 1886. None of these codicils is of importance in respect to the question in hand.

The testator sets apart his residence as a home for his wife and family, and then devises all his estate to his executors in trust to convert and use for the maintenance of his wife and family and to pay certain sums to his sons, "and at such time after the expiration of five years from and after the time of my decease as may seem to them advisable to equally divide apportion pay over and convey to all of my children" (naming them) "all and singular my real and personal estate in equal proportions share and share alike," save such portions as his executors may retain to provide from the interest for the wife and family residing with her in the homestead, any balance of income being divided yearly among all his children.

On the death of the widow the income shall be divided "until the time appointed by this my will for my executors . . . to divide apportion or pay over to my several children in equal proportions the whole of my real and personal estate."

"And I order and direct that in case any of my children should die without having received his or her portion given to them by this my will and leaving issue him or her surviving at the time a division of my estate shall be made among my children the child or children of such of my children so dying shall represent and receive their deceased parent's share but if any of my children should die leaving no issue him or her surviving the share or portion herein given or bequeathed to such child shall revert to and become part of my estate and be equally divided among all my surviving children."

According to *Kirby v. Bangs* (1900), 27 A.R. 17, a gift such as this, unless some ground for distinction can be found, is a gift to the children, subject to be divested in favour of the child or children of such of the testator's children as die before the actual receipt of his or her share, leaving children surviving.

In *Kirby v. Bangs* the contest was not between the executors of the child who had died and the children of that child, but between the executors of the child and the heirs and next of kin of the testator. The son in question had died without leaving any

children, and the contention was that his share was not vested at all.

But Moss, J.A., whose words I have substantially quoted in defining the nature of the gift, discusses the situation that would have arisen if the son had left surviving children, and the contest had been between them and the executors of the son, and says (p. 29): "If that were the question I think that, upon the weight of authority after much difference of opinion and some conflict of decision, it would have to be resolved in favour of the grand-children."

I am satisfied to accept this statement of the law, even though it is a dictum merely; and I can find nothing to throw any doubt upon its accuracy. The real question in this case, however, is one that did not present itself for consideration in that case, for there was there no discussion as to the meaning and effect of the divesting clause.

What is here argued is that the divesting clause relates only to the first period of five years, or, if this is not the case, the clause is void for uncertainty and because the vesting is made to depend upon the caprice or laxity of the executors in realising.

The material before me is singularly lacking in detail. It is not even shewn when the widow died. On the argument I was told that she survived her son, and died recently.

The aim of all the cases is to determine the intention of the testator. A testator may well intend that money which his child has not actually received shall be paid not to the child's executors but to his grandchildren; and, when this intention is expressed, effect must be given to it. The child may have creditors, and the testator may desire to benefit the grandchildren rather than the creditors of the child.

On the other hand, a testator may direct payment at a certain time, and may in another clause of his will refer to the receipt of the money given, in terms which shew that he regards it as certain that payment will be made at the time directed; and so the payment directed is the same thing as the receipt referred to; and in all cases of this kind the Court inclines to the view that the gift is vested as soon as it is payable, and that delay in payment does not cause the gift over to operate.

In *Gaskell v. Harman* (1805), 11 Ves. 489, Lord Eldon places

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the matter exactly where, after much discussion and controversy, the later cases leave it. At p. 497, he says:—

“I admit the soundness of the proposition . . . that, if a testator thinks proper, whether prudently or not, to say distinctly, shewing a manifest intention, that his legatees, pecuniary or residuary, shall not have the legacies, or the residue, unless they live to receive them in hard money, there is no rule against such intention, if clearly expressed. But that would be open to so much inconvenience and fraud, that the Court is not in the habit of making conjectures in favour of such an intention.”

Later, Lord Selborne in *Minors v. Battison* (1876), 1 App. Cas. 428, said (p. 452):—

“Such a divesting clause, if it refers to the time of actual receipt, is too uncertain and indefinite to be capable of being carried into effect. . . . It would be contrary to common sense to make the divesting of a vested interest depend upon the caprice or upon the dilatoriness of the trustee to sell.”

I cite these cases only to shew the opposite views, not to discuss them, for in *Johnson v. Crook* (1879), 12 Ch. D. 639, all the cases are very fully and critically discussed and explained by Sir George Jessel, and he declares the law to be in accordance with the view of Lord Eldon, and that where the testator has intended the gift over to take effect, and there has not been actual payment, that intention must be given effect to. “Uncertainty, in my opinion, there is none. Difficulty in ascertainment there is none. General policy there is none” (p. 644).

When payment is delayed by fraud, accident, or mistake, there might be room for Equity to interfere, but there was no case made upon this theory, and the effect of this is left an open question.

More recently in *In re Goulder*, [1905] 2 Ch. 100, Swinfen Eady, J., held that the decision of Sir George Jessel had finally settled the law, and, “as long as the event can be properly ascertained, legal effect must be given to the gift over.”

In this case the testator had given full discretion to the executors. He probably did not contemplate his wife surviving beyond the five years, for he directs the income to be divided during the period which is to elapse between the death of the wife and the division of his estate, but the executors are to divide after five years “at such time as may seem to them advisable,” and the gift

over is, "if any of my children should die without having received his or her portion." Here the executors, in pursuance of the dominant idea of the will, kept the estate intact during the life of the widow, and this son died during her life. And it appears clear to me that, in the events that have happened, the testator's will was that the property should go to his grandchildren.

It may be that this was all considered by Moss, J.A., when he penned his judgment in *Kirby v. Bangs*; but, as I was not clear as to this, I have investigated independently.

Declaration that grandchildren take and executors do not.

Costs out of the fund.

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March 5.

Trusts and Trustees—Mortgage Held by Trustee—corporation for Beneficiaries under Marriage Settlement—Vested Interest of Beneficiaries—Right to Take Property in Specie—Assignment of Mortgage to Accountant of Court—Compensation of Trustee—Arbitrary Percentage.

A trust corporation, trustee under a marriage settlement, had in its hands, as a part of the trust estate, a certain mortgage for a large sum. The shares of the beneficiaries, infant and adult, under the settlement, had been declared to be vested and not subject to be divested:—

Held, that the trustee-corporation could not insist upon retaining the mortgage until complete realisation: the beneficiaries could elect to take it in specie; and, upon their application, the corporation was ordered to assign the mortgage to the Accountant of the Supreme Court of Ontario to hold in trust for them.

Remarks upon the vicious system by which a trustee is allowed an arbitrary percentage upon the money which passes through his hands.

MOTION, by all persons beneficially interested, for an order directing the Toronto General Trusts Corporation to assign a mortgage for \$260,000, now held by it, as trustee under a settlement, to the Accountant of the Supreme Court of Ontario, to be held by him for the applicants.

February 8. The motion was heard by MIDDLETON, J., in Chambers.

A. W. Ballantyne, for the adult beneficiaries.

F. W. Harcourt, K.C., Official Guardian, for the infant beneficiaries.

W. N. Tilley, K.C., for the Toronto General Trusts Corporation.

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March 5. MIDDLETON, J.:—The history of the transaction is important. Under a marriage settlement dated the 17th May, 1876, certain land on Yonge street was settled in trust. By a judgment of the 22nd May, 1901, the trust corporation was appointed trustee in place of the survivor of the old trustees.

Early in 1917, an offer was made for the purchase of this land, an offer which was deemed exceedingly advantageous—but some question was raised as to the ability of the vendors to make title. This depended upon the construction of the marriage settlement; and, in order that a title might be made, it was arranged that the sale be carried out under the Settled Estates Act, and that the proceeds should be held by the trust corporation upon the trusts of the settlement, but that this should not prejudice the contention of those who contended that the estate had vested and was immediately divisible. This arrangement was given effect to by an order of the 17th February, 1917.

Subsequently the questions arising upon the settlement were dealt with, and it was on the 5th May, 1917, determined that the shares of the children under the settlement were and are vested and not subject to be divested.

The accounts of the trust corporation have been taken down to the 12th June, 1917, and commission allowed down to that date of \$6,075.96, over and above its commission on rents received, but this commission does not include any commission on the \$260,000 secured by this mortgage, which represents part of the price realised upon the sale of the Yonge street property.

The adults regard the commission which the corporation proposes to charge for the care and custody of this mortgage as a serious matter, and the Official Guardian joins with them in this motion. They contend that, the property being now vested, they can elect to take it in specie, and so ask to have the mortgage assigned to the Accountant to hold in trust for them.

The trust corporation takes the position that, having been constituted a trustee, it can insist on retaining the property or the mortgage which represents it until complete realisation. The dispute is frankly and openly as to its right to earn money in the future by receiving and paying over the money. The right of the corporation to remuneration for all services rendered up to now is admitted—it could not be disputed—so is its right to any proper

remuneration for services in making the transfer. The whole dispute arises from a most vicious system which has been grafted upon the statute which allows to a trustee a compensation for his care, pains, and trouble, which—instead of considering what the trustee has done or has failed to do, what his care, pains, and trouble have been, or what his real responsibility is—gives to him an arbitrary percentage upon the money which passes through his hands.

I think the beneficiaries have the right to demand the property held in trust for them in specie, and have the right to have it transferred to the trustee of their choice. I so direct, and refer the fixing of the compensation proper to be allowed to the Master in Ordinary.

The trustee may have costs as of an uncontested motion out of the fund, and the parties beneficially entitled may also have theirs from the same source.

[FALCONBRIDGE, C.J.K.B.]

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March 8.

FOXWELL v. POLICY HOLDERS MUTUAL LIFE INSURANCE CO.

Insurance (Life)—Lapse of Policy by Non-payment of Premium—Evidence of Revival—Onus—Acceptance by Agent of Insurance Company of Amount of Premium after Lapse and when Insured in Articulo Mortis—Terms and Conditions of Policy—Notice to Beneficiary—Official Receipt—Waiver—Absence of Knowledge of Impending Death—Premium not Actually Accepted by Insurance Company.

The plaintiff's husband, whose life was insured by the defendants, by a policy under which she was the beneficiary, died on the 22nd August, 1917, having been ill for one week. On the day before the death, the plaintiff paid to an agent of the defendants the amount of a premium which had been overdue since the previous 15th July. The agent gave the plaintiff a receipt for the amount, signed by himself, and containing the words "official receipt to follow." The agent handed the money to the defendants' bookkeeper, who, on the 22nd August, sent the official receipt, dated the 22nd August, signed by the manager and countersigned by the agent. This receipt stated on its face that agents were not authorised to receive premiums after the expiration of the days of grace, and that any person making such payment does so on the agreement that the acceptance thereof by the company shall not be regarded as evidence of waiver of any of the terms or conditions of the policy. The defendants, being notified of the death, endeavoured to return to the plaintiff the identical money which she had paid and which had been set apart in an envelope and so remained, but she refused to receive it, and brought this action to recover the amount of the insurance:—

Held, accepting the statement of the plaintiff that the agent had said nothing to her about furnishing a certificate of health when she paid him the money, that, nevertheless, having regard to the terms and conditions of the policy (set out below), she could not recover.

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The policy had lapsed; the onus was on the plaintiff to shew that it was revived; and she was confronted with abundant notice of the conditions upon which alone it could be revived.

The defendants could not waive the forfeiture without notice or knowledge of the fact that the insured was, when the money was paid, *in articulo mortis*. The money never "got home" to the defendants, in the sense of being accepted and regularly entered in their books.

ACTION by the widow of Walter E. Foxwell, deceased, to recover the amount for which his life was insured in her favour by a policy issued by the defendants.

The action was tried by FALCONBRIDGE, C.J.K.B., without a jury, at Toronto.

D. W. Saunders, K.C., and *E. C. Ironsides*, for the plaintiff.

H. R. Frost, for the defendants.

March 8. FALCONBRIDGE, C.J.K.B.:—Action by widow and beneficiary on a policy of insurance on the life of her husband.

Defence, that the policy lapsed and became void by reason of non-compliance of the insured with the terms thereof, in failing to pay the premium due thereunder on the 15th July, 1917, or within one calendar month thereafter, and also in subsequently failing to produce evidence satisfactory to the company that he was in good health, in addition to tendering the amount of such overdue premium to the agent of the company.

In the body of the policy appears the following clause:—

"Premiums are due and payable at the office of the company on or before the fifteenth day of the month in which they fall due, which day shall be known as the premium due date of the policy. A grace of one calendar month from the actual due date therefor will be allowed for the payment of all premiums hereon (except for the first), during which time the insurance will continue in force. If death occurs within the month of grace the unpaid portion of the premium for the current policy year will be deducted from the amount payable hereunder."

Among the *conditions and privileges* endorsed appears the following:—

"When a premium falls due and is not paid in cash within the calendar month's grace, if the said reserve (after deducting the accumulated indebtedness on this policy) is less than the annual premium, or if the accumulated indebtedness at any time exceeds

the reserve as above, this policy shall lapse and become void; but the company will, nevertheless, within five years thereafter, revive the policy on production of evidence, satisfactory to the company, that the insured is in good health, and on payment of any overdue premiums, with interest, as above stated, and of such a sum as shall reduce the indebtedness to an amount not exceeding the reserve. The reserve referred to herein shall be calculated for the number of full years' premiums paid, and not for any fractional part of the policy year."

Under the general provisions, also endorsed, appears:—

"4. If any premium is not paid on or before the date when due, the liability of the company shall be only as hereinbefore provided."

Also endorsed is the following notice:—

"Notice is hereby given that no receipts for payment shall be valid or binding upon the company except those issued from the head office in Toronto, upon the company's printed forms, signed by the president or vice-president or manager or secretary. Premiums are payable at the head office, but, for the convenience of the insured, they may, when not overdue, be paid to an agent of the company in exchange for the official receipt signed as above stated and countersigned by the agent."

The husband died on the 22nd August, 1917, having been ill for one week. On the day before (the 21st), the plaintiff paid to Frederick Marsh, city manager and district agent of the defendants, the overdue amount, \$3.32, and he gave her the following receipt:—

"Aug. 21st, '17. Received from Mrs. Foxwell sum of three dollars 32-100, being premium for month July and August, official receipt to follow.

"FRED MARSH."

This premium had been overdue since the 15th July.

The plaintiff says that Marsh made no objection, but just said that the official receipt would follow. She denies that he said anything about a declaration that her husband was in good health. She says she had never read the policy. Marsh was called for the defence, and says he told her that he or she would have to sign a certificate of good health; that nothing was said about his state of health. He did not give her a health certificate form, because, he said, he did not have one with him. This is the only question of

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fact in dispute in the whole case. Marsh gave her an unconditional receipt; and, as it seems to me that he is endeavouring to qualify that receipt, the onus is upon the defendants; and, the witnesses being of apparently equal credibility, I accept her statement as to what took place.

Marsh, who was going out of town, took the money to the bookkeeper of the defendants and asked him to send the official receipt. Marsh said that the bookkeeper in sending it was acting for him, Marsh, and not for the company. This is of course a question of law and not of evidence. The bookkeeper, on the morning of the 22nd, sent the official receipt, which is as follows:—

“The Policy Holders Mutual Life Insurance Co.
“Head Office, Toronto, Ont.

“No. 15350

“Policy No. A-1288, on the life of Walter E. Foxwell.

“Number of Months paid	Amount Paid	Agents are not authorised to receive premiums after the expiration of the thirty days of grace. Any person mak- ing such payment does so on the agree- ment that the acceptance thereof by the company shall not be claimed or regarded as evidence of waiver of any of the terms or conditions of the policy
2	\$3.32	

“Received this day the sum of

“Three Dollars and 32-100, being the amount of two months premium on the above mentioned policy.

“Countersigned at Toronto this 22nd day of August, 1917.

“F.M.

“A. M. Featherston,

“Agent.

“Manager.

“No receipt is valid unless signed by the manager and counter-
signed by the agent.”

The plaintiff said she did not read it. The plaintiff’s father notified the defendants of the death. The defendants repudiated all liability and endeavoured to return the identical money, which had remained in an envelope until Marsh should return. The money being refused, they purchased an express order in her favour, which was also returned to them.

Even giving the plaintiff the benefit of the finding of fact above

noted, I am of the opinion that she cannot recover. The policy had lapsed; the onus is on the plaintiff to shew that it was revived; and she is confronted with abundant notice of the conditions under which alone it could be revived.

Mr. Saunders does not contend that there is estoppel on the company by reason of what took place, but he says there was a waiver. I am unable to see how they could waive the forfeiture without notice or knowledge of the fact that the insured was then *in articulo mortis*. See *Smith v. Excelsior Life Insurance Co.* (1912), 3 O.W.N. 1521.

The money never "got home" to the company, in the sense that it was accepted by them and went regularly through their books. It was entered in the cash-book only, but never entered on the policy-card, and it did not form part of the bank-deposit of that day. As I said before, it remained in the envelope until Marsh should come back, and then efforts were made to return the money in specie, as before set forth.

There is at least one element in each of the cases cited for the plaintiff which distinguishes it from the one in hand: for example, *Whitehorn v. Canadian Guardian Life Insurance Co.* (1909), 19 O.L.R. 535, and *Horton v. Provincial Provident Institution* (1888-9), 16 O.R. 382, 17 O.R. 361, where the company had, by a practice and course of dealing, waived the lapsing of the policy.

Wells v. Independent Order of Foresters (1889), 17 O.R. 317, is very like this case, and so is *Bissell v. American Tontine Life Insurance Co.* (1871), 2 Bigelow Life and Accident Insurance Cases 150.

Note also the language of Collins, M.R., in *Handler v. Mutual Reserve Fund Life Association* (1904), 90 L.T.R. 192, 193; and see *Frank v. Sun Life Assurance Co.* (1893), 20 A.R. 564, affirmed in *S.C.* (1894), 23 S.C.R. 152, note; and *Knights of Maccabees v. Hilliker* (1899), 29 S.C.R. 397.

The action must accordingly be dismissed, but, under all the circumstances, without costs.

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[MASTEN, J.]

March 13.

RE BARNES.

Gift—Parent and Child—Construction of Documents—Gift or Loan—Death of Parent (Donor)—Duty of Executors—Intention of Parent—Evidence of, from Documents.

On the 8th July, 1913, the testatrix lent her daughter a sum of money; and on that day two documents were executed. By the first, signed by the daughter, she acknowledged the receipt of the sum "as a loan to be used as a first payment upon the house I also hereby agree to pay you interest half-yearly, and further agree that the said loan is to be a lien upon my equity in the said house, until paid or otherwise satisfied, but repayment of said loan is not to be demanded of me so long as I pay interest, and provide for the aforesaid lien, or give equivalent security satisfactory to you." By the second document, signed by the testatrix, she declared that, notwithstanding any testamentary disposal of her estate, the sum lent to her daughter "is hereby given to her absolutely and unconditionally for her own use, benefit, and disposal, and the said gift is not to be considered a part of my estate or subject to any condition of my will." No interest on the loan was ever paid. The testatrix died in March, 1917. By her will, her daughter was appointed one of her executors. The two documents were found enclosed in an envelope with this endorsement: "In the event of my death, this envelope is to be delivered, unopened, to my daughter:—"

Held, the intention to give being plain and absolute, being communicated to the donee, and continuing until the death of the testatrix, that "*donatio in præsentis tradenda in futuro*" was shewn, and that the daughter was not a debtor to her mother's estate in respect of the sum lent or interest thereon.

Re Goff (1914), 111 L.T.R. 34, followed.

Strong v. Bird (1874), L.R. 18 Eq. 315, and *In re Innes*, [1910] 1 Ch. 188, considered.

APPLICATION by the executors of the will of Elizabeth A. Barnes, deceased, for the advice and direction of the Court in respect of a sum of \$1,500 lent by the testatrix to her daughter.

March 5. The motion was heard by MASTEN, J., in the Weekly Court, Toronto.

A. M. Dewar, for the executors.

H. R. Frost, for Ida L. L. Pell.

F. W. Harcourt, K.C., Official Guardian, for the infants and (by order) for all others interested.

March 13. MASTEN, J.:—Ida L. L. Pell is the daughter of the testatrix Elizabeth A. Barnes. On the 8th July, 1913, the testatrix Elizabeth A. Barnes lent to her daughter the sum of \$1,500, and on that date the two following documents were executed:—

(1) "Toronto, Ont., July 8th, 1913.

"I, Ida Louise Loretta Pell, hereby acknowledge receipt this

day from you of the sum of fifteen hundred dollars (\$1,500.00) as a loan to be used as a first payment upon the house No. 16 Algonquin Ave., Toronto.

"I also hereby agree to pay you interest at the rate of 6 per cent. per annum on the said loan, payable half-yearly, and further agree that the said loan is to be a lien upon my equity in the said house, until paid or otherwise satisfied, but repayment of said loan is not to be demanded of me so long as I pay interest, and provide for the aforesaid lien, or give equivalent security satisfactory to you.

"Witness

"Ida Louise Loretta Pell,

"Harry Saxon Pell.

"E. A. Barnes."

(2) "Toronto, Ont., July 8th, 1913.

"I hereby direct that notwithstanding any testamentary disposal of my estate which I have made or may hereafter make, the sum of fifteen hundred dollars loaned by me to my daughter Ida Louise Loretta Pell, on the 8th day of July, 1913, is hereby given to her absolutely and unconditionally for her own use, benefit, and disposal, and I expressly provide that the said gift of fifteen hundred dollars is not to be considered a part of my estate or subject to any condition of my will.

"Witness

"Harry Saxon Pell.

"E. A. Barnes."

These documents were enclosed in an envelope, endorsed as follows:—

(3) "In the event of my death, this envelope is to be delivered, unopened, to my daughter, Ida L. L. Pell, 16 Algonquin Ave., Toronto, Ont.

"Witness

"Harry Saxon Pell.

"E. A. Barnes."

The testatrix died on the 24th March, 1917. No interest was ever paid by the daughter Mrs. Pell on the loan.

By her will the testatrix appointed her daughter Ida, her brother David Beatty, and John N. Lake, of Toronto, to be the executors and executrix of her will.

The question submitted is, whether the advance made in 1913 to Ida L. L. Pell forms part of the estate of the deceased, which it is the duty of the executors to collect.

The documents above quoted make it clear that it was the intention of the testatrix that, at her death, if she predeceased her daughter, all claims under the above documents should cease.

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The Court is naturally desirous of giving effect to that intention if it is possible so to do without contravening established principles.

It is plain that the arrangement evidenced by the two documents above, was one, though the documents were executed separately, in the order in which they are quoted above; and I interpret the arrangement to have been such that the gift was not then immediately complete, but on the contrary that the mother should be entitled, if she so desired, to claim interest on the money as a loan so long as she lived, and possibly, if the daughter predeceased her, to make claim for the principal. The gift was therefore incomplete on the 8th July, 1913, and I do not think that the daughter could, on the 9th July, 1913, have effectively brought an action to have it declared that there was no obligation or to have it declared that the lien against her premises was discharged. It is also manifest that the documents above quoted cannot be effective as a testamentary bequest.

In *Strong v. Bird* (1874), L.R. 18 Eq. 315, the head-note is as follows:—

“B. borrowed £1,100 from his step-mother, who lived in his house, paying £212 10s. a quarter for board; and it was agreed that the debt should be paid off by a deduction of £100 from each quarter's payment. Deduction of this amount was made for two quarters, but on the third quarter-day the creditor refused to make any further deduction, and paid the full amount of £212 10s., and continued down to the time of her death (which took place more than four years afterwards) to pay to B. the like quarterly sum. B. was appointed sole executor of his step-mother, and proved the will: and a suit for administration was instituted:—

“*Held*, that the debt was gone: first, because the appointment of B. as executor released the debt at law, and any claim in equity was rebutted by evidence of a continuing intention on the part of the testatrix to give; and, secondly, because the intention of the testatrix to give B. the sum of £900 was completed by nine quarterly payments of £212 10s. each.”

In that case Sir George Jessel, M.R., says (pp. 317, 318, 319):—

“First of all it is said, and said quite accurately, that the mere saying by a creditor to a debtor, ‘I forgive you the debt,’ will not operate as a release at law. It is what the law calls *nudum pactum*, a promise made without an actual consideration passing, and which

consequently cannot be supported as a contract. It is not a release, because it is not under seal. Therefore the mere circumstance of saying, 'I will forgive you,' will not do. There are, however, two modes in which, as it appears to me, the validity of this transaction can be supported. First of all, we must consider what the law requires. The law requires nothing more than this, that in a case where the thing which is the subject of donation is transferable or releasable at law, the legal transfer or release shall take place. The gift is not perfect until what has been generally called a change of the property at law has taken place. Allowing that rule to operate to its full extent, what occurred was this. The donor, or the alleged donor, had made her will, and by that will had appointed Mr. Bird, the alleged donee, executor. After her death he proved the will, and the legal effect of that was to release the debt in law. and therefore the condition which is required, namely, that the release shall be perfect at law, was complied with by the testatrix making him executor. It is not necessary that the legal change shall knowingly be made by the donor with a view to carry out the gift. It may be made for another purpose; but if the gift is clear, and there is to be no recall of the gift, and no intention to recall it, so that the person who executes the legal instrument does not intend to invest the person taking upon himself the legal ownership with any other character, there is no reason why the legal instrument should not have its legal effect. For instance, suppose this occurred, that a person made a memorandum on the title-deeds of an estate to this effect: 'I give Blackacre to A.B.', and afterwards conveyed that estate to A.B. by a general description, not intending in any way to change the previous gift, would there be any equity to make the person who had so obtained the legal estate a trustee for the donor? The answer would be that there is no resulting trust; that is rebutted by shewing that the person who conveyed did not intend the person taking the conveyance to be a trustee, and although the person conveying actually thought that that was not one of the estates conveyed, because that person thought that he had well given the estate before, still the estate would pass at law, notwithstanding that idea, and there being no intention to revoke the gift, surely it would get rid of any resulting trust. On the same principle, when a testator makes his debtor executor, and thereby releases the debt at law, he is no

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longer liable at law. It is said that he would be liable in this Court: and so he would, unless he could shew some reason for not being made liable. Then what does he shew here? Why he proves to the satisfaction of the Court a continuing intention to give; and it appears to me that there being the continuing intention to give, and there being a legal act which transferred the ownership or released the obligation—for it is the same thing—the transaction is perfected, and he does not want the aid of a Court of Equity to carry it out, or to make it complete, because it is complete already, and there is no equity against him to take the property away from him.”

But in that case the gift was completed by the subsequent action of the parties during the lifetime of the testatrix, and so in the subsequent cases of *In re Griffin*, [1899] 1 Ch. 408; *In re Applebee*, [1891] 3 Ch. 422; and *In re Stewart*, [1908] 2 Ch. 251.

A difficulty which presented itself to my mind is illustrated by the case of *In re Innes*, [1910] 1 Ch. 188. In that case the facts (as stated in the head-note) were as follows:—

“The plaintiff lived with and kept house for her father, and frequently asked him to pay her a salary as housekeeper. In 1902 he gave her a document, whereby he declared that from and after September 30, 1902, she should receive from his business £2 *per week*, or about fifty-two sums of equal amount *per annum*, and also an additional sum of £2 a week, to remain in the business, and to be withdrawn by her, if necessary, after an investment lasting for five years, with increase of 5 per cent. *per annum*. The £2 a week was never paid, but she received from her father various sums amounting to £78 10s. In 1905, at his request, she gave back the document so that he might consult a solicitor about it and see that there should be no doubt of her getting the money; and she found it among his papers after his death. By his will the father appointed the plaintiff to be an executrix and directed that his estate should be equally divided between his children.” The plaintiff claimed that the gift of the document, coupled with her appointment as executrix, was a complete gift of the amounts specified in the document.

At pp. 193 and 194 of the report, Parker, J., says:—

“In my opinion the principle of *Strong v. Bird*, L.R. 18 Eq. 315, and other similar cases ought not to be so extended. What is

wanted in order to make that principle applicable is certain definite property which a donor has attempted to give to a donee, but has not succeeded. There must be in every case a present intention of giving, the gift being imperfect for some reason at law, and then a subsequent perfection of that gift by the appointment of the donee to be executor of the donor, so that he takes the legal estate by virtue of the executorship conferred upon him. It seems to me that it would be exceedingly dangerous to try to give effect by the appointment of an executor to what is at most an announcement of what a man intends to do in the future, and is not intended by him as a gift in the present which though failing on technical considerations may be subsequently perfected."

Were it not for the case of *Re Goff* (1914), 111 L.T.R. 34, I might have felt myself overborne by the difficulties raised by the case of *In re Innes*. But the case of *Goff* appears to me to be so much in point that I think I ought here to follow it.

In that case the testatrix wrote a letter offering a sum of £150 to her friend, and in the letter making that offer she said:—

"I do not require security further than the following: (1) That you would give me an I.O.U., to be used only in the case of your death before mine, so that this loan might hold the same position with regard to your property as any other debts that might be owing. (2) That in case you raise any further sums, before using any such sums you repay my loan, as I only suggest lending it in order to obviate your having to raise money in other quarters. (3) That you place a letter among your papers asking your mother and aunt if they survive you either to keep up the interest on the loan or to pay it off, which latter course I should prefer. Further, that you give me and your trustees a letter to the same effect, and that you place also a similar letter to the trustees at the time of your death with the letters to your mother and your aunt. I engage not to use the I.O.U. during your life; also not to call in the loan, but leave it with you as long as you want it and the interest is paid . . ."

Afterwards the testatrix seemed offended when the friend to whom the loan had been made offered to repay the capital, and said: "I thought it would just fall into your hands when I died. The I.O.U. is in an envelope with my papers directed to you, and when I die all you have to do is to destroy it." And the testatrix eventually appointed her friend her executrix.

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In his judgment, Sargant, J., said:—

“I have no doubt that either Miss Murphy did not owe the debt or that it had been released, but on the construction of the letter the testatrix arranged that the debt would not be enforceable in the event of the testatrix predeceasing Miss Murphy. If there was a debt it was released by the appointment of her as executor, coupled with the continuing intention to forgive the debt. When the only evidence in support of a claim against a dead man is the uncorroborated evidence of the debtor, it has to be examined with scrupulous care. I entirely believe the evidence of Miss Murphy in this case. *Strong v. Bird* (*ubi sup.*) applies here. The legal release of the debt by appointment of her as executor coupled with a continuing intention to release the debt is sufficient. I hold accordingly that Miss Murphy is not a debtor to the estate in the sum of £150 or any part thereof or in any interest in respect thereof.”

In the present case, it is to be observed that the intention to give is plain and absolute; that it was formally communicated to the donee, as appears by the signatures to the documents above quoted; and that this intention to give continued until the death of the testatrix. Such being the case, I think it is “*donatio in præsentī tradenda in futuro*,” and, following the case of *Re Goff*, I declare that Ida L. L. Pell is not a debtor to the estate in the sum of \$1,500, or any part thereof, or in any interest in respect thereof.

Costs of all parties out of the estate; those of the executors as between solicitor and client.

[IN CHAMBERS.]

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March 14.

REX v. WELFORD.

Ontario Temperance Act—Offence against sec. 51—Magistrate's Conviction—Physician—Prescription for Intoxicating Liquor—Evasion of Act—Evidence of Large Number of Similar Prescriptions—Admissibility—Bona Fides—Motive—Finding of Magistrate—Review—Form of Prescription—Non-compliance with Statute.

The defendant, a practising physician, was convicted by a magistrate of an offence against the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50, sec. 51, as amended by the Ontario Temperance Amendment Act, 1917, 7 Geo. V. ch. 50, sec. 18, by giving to one M. a prescription for one pint of alcohol, in evasion and violation of the Act, and for the purpose of enabling and assisting him to evade the Act and to obtain intoxicating liquor for use as a beverage:—

Held, that evidence tending to establish that the defendant had issued a great number of requisitions for potable liquor for bathing purposes, was properly admitted by the magistrate. Where the question of motive is involved, such evidence is admissible; and the question for the magistrate was, whether the defendant was acting honestly as a physician, or dishonestly and intending to assist in the distribution of intoxicating liquor contrary to the statute.

Makin v. Attorney-General for New South Wales, [1894] A.C. 57, followed.

And *held*, that the question of *bona fides* was for the magistrate, and his finding could not be reviewed on a motion to quash the conviction.

The defendant, in filling up the prescription for M. and other prescriptions, had not complied with the Act: the name of the patient and the nature of the illness must be stated so that the *bona fides* may be tested.

MOTION to quash the conviction of Albert B. Welford, by the Police Magistrate for the City of Woodstock, on the 18th February, 1918, for violation of sec. 51* of the Ontario Temperance Act, 6 Geo. V. ch. 50, by giving to one Thomas Mitchelson a prescription for one pint of alcohol, in evasion and violation of the

*The part of sec. 51 (as amended by the Ontario Temperance Amendment Act, 1917, 7 Geo. V. ch. 50, sec. 18) applicable is as follows:—

51.—(1) Any physician who is lawfully and regularly engaged in the practice of his profession, and who shall deem any intoxicating liquors necessary for the health of his patients, may give such patient or patients a written or printed prescription therefor, in the form in schedule "E1" to this Act or to the like effect, addressed to a druggist and not exceeding six ounces, except in the case of alcohol for bathing a patient or other necessary purpose, or liquor mixed with any other drug is required when a quantity not exceeding one pint may be prescribed, but no such prescription shall be given except in cases of actual need, and when in the judgment of such physician the use of liquor is necessary, or such physician may administer the liquor himself, and for that purpose may have one quart in his possession when visiting his patients. And every physician who shall give such prescription or administer such liquor in evasion or violation of this Act or who shall give to or write for any person a prescription for or including intoxicating liquor for the purpose of enabling or assisting any person to evade any of the provisions of this Act, or for the purpose of enabling or assisting any person to obtain liquor for use

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Act, and for the purpose of enabling and assisting him to evade the said Act and to obtain intoxicating liquor for use as a beverage.

March 8. The motion was heard by MIDDLETON, J., in Chambers.
J. W. Bain, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

March 14. MIDDLETON, J.:—The facts are not seriously in dispute. On the 10th January, 1918, the accused gave Mitchelson a requisition reading: “Required for Thomas Mitchelson, Brooksdale P.O., 1 pint alcohol for medicinal purposes only for the patient above named who is suffering from Bathing. A. B. Welford.”

The circumstances surrounding the obtaining of this certificate are stated by Mitchelson: “I had a cold on 10th January last. I saw Dr. Welford on that date to get some medicine for my mother. I asked for alcohol for bathing purposes, did not say who for. Dr. Welford did not examine me that day. He gave me a prescription to get the medicine and for the alcohol. I had the two orders or prescriptions. I knew of Dr. Welford before; he had never attended me before. I did not know him personally. I asked for alcohol because I wanted it. I drank some of it. I

as a beverage, or to be sold or disposed of in any manner in violation of the provisions of this Act, shall be guilty of an offence under this Act.

The schedule E1 referred to is found at the end of the Act of 1917, and is as follows:—

SCHEDULE “E1.”
Prescription for liquor by medical practitioner.
General Form.
(Under section 51)
Date.....19...
To
Druggist.
Required for
(Give name, address and occupation of person for whom liquor is required.)
ounces of Liquor for Medical Purposes only, for the patient above named
(Doctor’s signature in full.)
Notes:
(a) Not more than 6 ounces can be prescribed for internal use.
(b) Where alcohol is required for bathing a patient, one pint may be ordered.
(c) This prescription can only be filled once, and must be filed by the druggist to be hereafter inspected if required.
(d) The person to whom the above liquor is delivered by the druggist must sign for the same on this prescription.
(e) This prescription may be filled by any duly qualified and registered druggist.
Signature of person to whom liquor was delivered.

wanted to take some home. I did not get it exactly for that purpose. Dr. Welford asked me if it was for bathing purposes. I did not want it for bathing purposes. Dr. Welford asked me if I wanted it for bathing purposes, and I said 'yes.' I think he charged me—I gave him 50 cents for each certificate . . . I did not take the alcohol home. I stopped at my relatives. I got intoxicated on it."

The doctor's version of the affair is: "I did not know Mitchelson—never saw him before to my knowledge. Recollect him calling on 10th January . . . told me his mother ill. Very old woman . . . I prescribed Russian oil for internal use and handed him the prescription, for which he paid me a dollar. He then said, 'Can I get some alcohol?' I said, 'Is this for your mother too?' He said, 'Yes.' I said, 'You cannot get it for any other purpose than external or bathing purposes.' I then wrote out prescription in his mother's name. Then I realised he could not sign his mother's name, and so I tore it up and gave him prescription (exhibit A). I gave that prescription for bathing his mother because he asked for it, and on his representation I deemed it necessary. . . . This alcohol was prescribed for bathing and no other purpose. . . . I have never seen his mother."

Evidence was given in chief by the druggist to whom the prescription was addressed, shewing that between the 22nd December and the 10th January he had filled, on the authority of the accused, 47 requisitions for alcohol for bathing and 12 for liquor; and by another druggist, shewing that he had received in the same time 13 requisitions for alcohol and 5 for liquor from him. Then, all in one day, 10 for alcohol and 2 for liquor.

This evidence was objected to and admitted subject to the objection. Mr. Cartwright says that he is told by the magistrate that he did not act on it.

Under the statute it is necessary to determine whether the physician is acting in good faith in granting certificates or requisitions under the statute; and it seems to me well established by a long series of cases, of which *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, is the most important, though by no means the earliest, that where the question of motive is involved, evidence such as this can be admitted.

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The question here was, whether the accused was acting honestly as a physician, or dishonestly and intending to assist in the distribution of liquor contrary to the statute; and surely the issue in a wholesale manner of requisitions for potable liquor for bathing is most cogent evidence on the question of good faith. Alcohol, no doubt, is often used for external bathing; but the fact that 10 men obtain this prescription from one doctor in a day, and that the doctor makes no explanation of this, might well lead the judicial mind to regard the particular transaction as one calling for careful scrutiny.

The form prescribed and used calls for the name of the patient to be given and the nature of the illness. Here the name of the supposed patient, the mother, is not given, but the name of the thirsty son is, and his illness is given as "bathing," shewing how hard it sometimes is for even an educated man to fill up a simple form. This is not an offence; but all the other forms are filled in in the same way, and so the Act has not been complied with.

The patient and his illness are to be stated so that the *bona fides* may be tested. The liquor may be delivered to the bearer of the prescription.

The necessity for the liquor must depend on the judgment of the physician, but only in cases of "actual need." The physician is not required to see the patient, but he must be satisfied of the necessity either by seeing the patient or in some other way. It was never contemplated that the would-be lawbreaker could obtain a pint of alcohol by the simple process of going to a doctor and stating that he desired it to bathe a bed-ridden mother. Some real duty is cast upon the medical man to satisfy himself that there is a mother and that she needs this remedy.

The magistrate in this case has concluded that there was an absence of *bona fides*, and I cannot review his finding. I am inclined to think it would be impossible to find a magistrate who would have come to any other conclusion.

The enormous extent to which alcoholic bathing seems to be indulged in, in Woodstock at least, among the patients of this doctor, suggests that it might be well if some non-potable ingredient could be mixed with alcohol for external use. The extent to which alcoholic bathing seems necessary in the case of some particular individuals is demonstrated by the prescriptions produced: "G.G.

had two pints on the 22nd December, another on the 24th, another on the 28th, another on the 29th; two pints on the 5th January; another two pints on the 7th January." And other patients seem to have required almost as much bathing—*e.g.*, Mr. P. V. and Mr. B. V., both having the same address, both obtained alcohol for bathing on the 24th December, each a pint. B. V. had a pint on the 22nd, and obtained others on the 3rd and the 5th January.

The motion fails and must be dismissed with costs.

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RE MONKMAN AND CANADIAN ORDER OF CHOSEN FRIENDS.

Insurance (Life)—Change of Beneficiary—Preferred Class—Declaration in Writing—Sufficiency—Insurance Act, R.S.O. 1914, ch. 183, sec. 171(5)—Will—Printed Form—"Personal Estate"—Inclusion of Insurance Moneys—Effect of Printed Explanatory Clause—Wills Act, R.S.O. 1914, ch. 120, secs. 2, 12(2), 30—Interlineation—Nuncupative Will—Wills Act, sec. 14.

The beneficiaries named in an insurance policy on the life of M. were his father, mother, and a brother. M. died leaving a will executed when he was on active service abroad as a soldier. This will was framed by filling up the blanks in a printed form of a "soldier's will." The directions for filling in the blanks and for execution and attestation were in the body of the document, not in the margin. The will as drawn up and executed contained this clause: "My personal estate I bequeath to my wife" (naming her); and beneath the place for the signature, where M. had affixed his signature, and above the *testimonium* clause, were the printed words: N.B. Personal estate includes . . . insurance policy, in fact everything except real estate:"—

Held, that, whether or not this document operated as a will making a valid disposition of the insurance money, it was a declaration under sub-sec. (5) of sec. 171 of the Ontario Insurance Act, sufficient to effect a valid change in the beneficiary in favour of the wife, one of the preferred class, substituting her for the original beneficiaries.

Semble, that, although the *nota bene* clause was not part of the will, because not intended to be so, it was not to be ignored altogether—it should be taken as explanatory of what was included in the term "personal estate;" and the document might be regarded as a testamentary document supporting the claim of the wife to the insurance money.

Sections 2, 12(2), and 30 of the Wills Act considered.

Semble, also, that, if the *nota bene* clause should be deemed to have been intended to be part of the will, it might be treated as an interlineation, self-evidently made before the execution of the will and above the *testimonium* clause, and so supporting the wife's claim. But, treating the document as a nuncupative will, under sec. 14 of the Wills Act, the wife was not aided, because that section authorises a disposal of "personal estate" as interpreted by that enactment only.

MOTION by Ellen M. Monkman, widow of John Wesley Monkman, deceased, for an order for payment out of Court of a sum paid

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in by the Canadian Order of Chosen Friends, representing an insurance on the life of the deceased.

March 11. The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court, Toronto.

A. R. Hassard, for the applicant.

J. M. Godfrey, for the mother, father, and a brother of the deceased.

F. W. Harcourt, K.C., Official Guardian, for an infant and for one Orr Monkman.

March 18. MEREDITH, C.J.C.P.:—The single question involved in this case is:—whether John Wesley Monkman duly changed the beneficiaries of the insurance money in question: and whether such a change was made or not depends upon the question: whether, in that which he did, he complied with the provisions of the Ontario Insurance Act respecting such a change.

Originally his mother, father, and a brother were the beneficiaries. The writing which the applicant contends effected the change is in the following words:—

“Form of Will.

“I, John Wesley Monkman (Name in full) Regimental number 800007, serving in of the Canadian Expeditionary Force, do hereby revoke all former Wills by me made and declare this to be my last Will.

“I bequeath all my real estate unto my wife,	
“Ellen Monkman	} Name and Address of person or persons to whom it is to go.
“45 Morse St.	
“Toronto, Can.	

“absolutely, and my personal estate I bequeath to my wife,	
“Ellen Monkman	} Name and Address of person or persons to receive personal estate*
“45 Morse St.,	
“Toronto, Can.	

(see note)

“Important Note this 1 day of Aug. A.D. 1916.

“this must be

signed and dated by

The Soldier Himself. (Sgd.) J.W. Monkman Signature of Soldier.

* “N.B. Personal estate includes pay, effects, money in bank, insurance policy, in fact everything except real estate.

"Signed and acknowledged by the Testator as and for his last Will in the presence of us both present at the same time, who in his presence, at his request, and in the presence of each other have hereunto subscribed our names as witnesses.

"Signature of first Witness (Sgd.) G. Heighington Lt.

"The Two "Address of Witness 134 Overseas Battalion
(48 Highlanders) C.E.F.

Witnesses "Occupation of Witness Soldier.

Must Sign "Signature of second witness (Sgd.) R. S. Dunlop Lt.

Here." "Address of witness 134th Overseas Battalion
(48th Highlanders) C.E.F.

"Occupation of Witness Soldier."

The man's signature—as will be observed—is above the *nota bene* sentence.

But neither that circumstance, nor any question as to the validity or effect of the writing as a will, is material, if otherwise the writing be sufficient to effect the change.

The Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 171, sub-sec. (5), provides that:—

"(5) Where the declaration describes the subject of it as the insurance or the policy or policies of insurance or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favour of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last mentioned declaration."

This sub-section was added to the Act to counteract, it is said, the effect of a ruling of a Divisional Court, giving effect to a somewhat strict interpretation of sub-sec. 3 of sec. 171, in the case of *In re Cochrane* (1908), 16 O.L.R. 328.

The result of all which is:—that, if it appear from the words used by the man in this writing that he desired to change the beneficiaries of these moneys from his mother, father, and brother to his wife, effect must be given to it accordingly.

And there can be no doubt that such was his intention: because the words which he was, and we are, in print, required to note well, say so:—"personal estate includes . . . insurance policy, in fact everything except real estate."

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In the concurrence of the words of sub-sec. (5), which I have quoted, and these words in the will, it seems to me to be made very plain that (1) the intention of the man was to give to his widow this insurance money; and that (2) in law, under sub-sec. (5), she takes it.

The case is not like that of *In re Jansen* (1906), 12 O.L.R. 63, in which the will was invalid, and, if it were, it would be necessary to consider whether, having regard to the important change in the law on the subject caused by the introduction of sub-sec. (5) since that case was decided, that case has now any binding effect: see *per* Riddell, J., in *Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30.

The sub-section (5) is not limited to wills—it comprises a declaration in writing in any form—and so it may be that, although contained in what was intended to be a will, it may be good though for some reason the writing may not be valid as a will: for instance, a declaration dealing with an insurance fund independently ought to be good under sub-sec. (5) though in the form of a will which is not duly executed so as to take effect as a will. In such a case there can be no doubt of the intention of the insured, and the Act does not require an expression of that intention in a will—any writing will do—but, when the declaration is dependent on other things provided for in the will, but which cannot be given effect because of the invalidity of the will, the declaration should fail, not because of the insufficiency of the writing, but because the insured has failed to give legal expression to his whole intention regarding the insurance; he has left incomplete and insufficient his declaration respecting the money.

I hold that the declaration in question is a sufficient compliance with the provisions of sec. 171 of the Act so as to substitute the widow as sole beneficiary, of the insurance money in question, for the former beneficiaries, the respondents in this motion.

It is not necessary, therefore, that the widow should rely upon the will as a testamentary document to support her claim to the money; but, if she had to take that position, I am not able to agree with Mr. Godfrey that she should fail.

Mr. Godfrey's main points are: that the "*nota bene*" clause is not part of the will because it is below the testator's signature: the

Wills Act, R.S.O. 1914, ch. 120, sec. 12 (2)*; and that, without it, the words "personal estate" are not comprehensive enough to embrace the insurance money in question, because, especially, of the interpretation clauses of the Wills Act, sec. 2, in which it is provided that, in that Act, the words "personal estate" "shall include leasehold estates and other chattels real, and also money, shares of government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property, except real estate, which by law devolves upon the executor or administrator, and any share or interest therein;" words not wide enough to embrace these moneys, which would not devolve on executor or administrator.

I agree that the *nota bene* sentence is not part of the will, but not so much on the ground relied upon by Mr. Godfrey as on the ground that it was not intended to be an integral part of it. It was plainly, I think, only part of the information and instructions regarding a will and its execution, intended to be imparted by those who drafted and those who printed and sold such forms, just as, in other respects, there are the guides, for the benefit of the unlearned in legal knowledge, printed in other parts of the body of the will, instead of being printed, as would be perhaps more usual, in the margin of it.

But it does not follow that because the *nota bene* clause was printed in the form of the will for that purpose only, it is to be

* (2) Every will, so far only as regards the position of the signature of the testator, or of the person so signing for him, shall be valid, within the meaning of this Act, if the signature is so placed, at, or after, or following or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will; and no such will shall be affected by the circumstance that the signature does not follow or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or by the circumstance that the signature is placed among the words of the *testimonium* clause, or of the clause of attestation, or follows or is after or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature is on a side, or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will is written above the signature, or by the circumstance that there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature shall be operative to give effect to any disposition, or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature was made.

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ignored altogether. It was printed for a purpose which it performed; and the commonest of common sense requires that it be taken into account; and, if the words "personal estate" are capable of comprising all that is set out in the dictionary or explanatory clause, they should be held to include it. It is erroneous to say that the interpretation clauses of the Wills Act prevent that; for, in the first place, they are not exclusive, they are inclusive only; then they are applicable only to the Act, not to this or any other will; and then, the 30th section* gives them a further inclusive effect so as to embrace any personal estate which the testator has power to appoint in any manner he may think proper: so that, under this section, the will would carry with it, in any case, at the least, all the money in question except the \$500 of which the testator's mother was beneficiary; and it must be added that the testator had much more power over and concern in this insurance than a mere power of appointment of the insurance moneys. That was pointed out in the case of *Baeder*, 36 O.L.R. at pp. 35, 36. The contract was his contract; and, as far as he had any power over it, and all that might come from it, it was his personal property.

So there is nothing to prevent the moneys in question passing under this will to the sole devisee and legatee named in it—the testator's widow; there is everything to require it. Nor can I think there would be if the *nota bene* clause should be deemed to have been intended to be part of the will; for, in that case, there is authority for treating it as an interlineation, self-evidently made before the execution of the will and above the attestation clause: see *In the Goods of Kimpton* (1864), 3 Sw. & Tr. 427; *In the Goods of Birt* (1871), L.R. 2 P. & D. 24; *In the Goods of Wilkinson* (1881), 6 P.D. 100. But, treating it as a nuncupative will, under sec. 14 of the Wills Act, the applicant is not aided, because that legislation authorises a disposal of "personal estate" as interpreted by that enactment only.

However—looked at in more than one way—the money in

30. . . . a bequest of the personal estate of the testator, or any bequest of personal estate described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description will extend, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will.

question is now the personal property of the applicant, and should be paid out to her.

The case is not one in which any order as to costs should be made, except that the applicant, having brought the Official Guardian here for precautionary purposes only, should pay his fee upon this motion.

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[APPELLATE DIVISION.]

1918

March 19.

MILTON PRESSED BRICK CO. v. WHALLEY.

Mechanics' Liens—Lien of Material-men—Materials Delivered to Contractor but not upon Land Sought to be Affected—Proximity to Land—Lien upon Land and Building—Lien upon Materials—Damages Suffered by Owner by Non-completion—Inquiry as to—Stating Result in Judgment—Mechanics and Wage-earners Lien Act, R.S.O. 1914, ch. 140, secs. 6, 16, 37(3).

Material-men claimed a lien upon their own goods which they had sold to the contractors for the erection of a building, who had become insolvent. The materials were delivered upon the street in front of the building in course of erection and the land upon which the lien was claimed, but never actually reached the land:—

Held, that a lien under the Mechanics and Wage-Earners Lien Act, either on the land or on the materials, is not created by mere appropriation of goods to a contract, or on delivery to the owner or contractor, unless they are placed upon or reach the land to be affected.

The general lien under sec. 6, and the special one in the nature of a vendor's lien upon the materials themselves under sec. 16, depend upon the same condition—the placing of the materials upon the land. Proximity to the land is not enough; the materials must be on it, so that either in fact or in contemplation of law the value of the land itself is enhanced by their presence.

Ludlam-Ainslie Lumber Co. v. Fallis (1909), 19 O.L.R. 419, applied.

The damages suffered by an owner owing to non-completion, while not available to him as a set-off against claims for wages, nor to diminish the statutory percentage required to be retained by him, may be and sometimes must be gone into before the Judge or officer trying a case under the Act. To ascertain the sum justly due from the owner to the contractor necessitates an inquiry, where a case is made for it, as to the value of the work done and the damages suffered—to be set off or deducted—for work undone or improperly done or for delay; and, in a case where such an inquiry is proper, the result may be stated in the judgment: sec. 37(3).

Judgment of the Judge of the County Court of the County of Welland affirmed.

AN appeal by Hepburn & Disher Limited from the judgment of the Judge of the County Court of the County of Welland in an action in which the Milton Pressed Brick Company were plaintiffs and Percy R. Whalley, George Albert Toyn, Thomas F. White, John Gardner, and T. E. Ryan were defendants.

The facts appear in the reasons for the judgment of the County Court Judge, which were as follows:—

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This is an action under the Mechanics and Wage-Earners Lien Act. By written contract, dated the 12th April, 1917, the defendants Ryan and Gardner, as contractors, agreed with the defendants Percy R. Whalley and George Albert Toyn, the owners, to do the work and furnish the materials in connection with alterations and an addition to the Arlington Hotel, Welland, required to change the building into a theatre. The work was to be done in accordance with the plans and specifications prepared by the architect, C. M. Borter. The contract price was \$10,724, payable 80 per cent. monthly on the architect's certificate, the balance when the work should be completed.

The contractors proceeded with the work, but on or about the 7th June, 1917, owing to the negligent manner in which the work was carried on, the rear part of the building collapsed. According to the evidence of the defendant Whalley, there were ten rooms and a hall in the upstairs part of the building that collapsed. These rooms were furnished, and the contents were totally destroyed. Mr. Whalley estimates the value of the contents of these rooms at \$100 per room, making a total of \$1,000. At and before the time of the collapse, these rooms were let to roomers at \$5 per week; and, owing to the collapse, the owners claim to have lost a revenue of \$50 per week. The architect estimates that it would cost \$6,126 to rebuild the collapsed portion of the building. Shortly after the building collapsed, the contractors, Ryan and Gardner, made an assignment to the sheriff, for the general benefit of their creditors, and they have abandoned the work. The architect says that, if a contract were now let to do the work contemplated by the original contract, it would cost the owners from \$1,400 to \$1,500 more than the original contract price. According to the original contract, the work was to be completed by the 1st August, 1917, and the contractors were to pay to the owners \$5, as "stipulated" damages for each day's delay in completion after the time specified. The architect estimated, at the time of the trial, that it would take three months from that date to complete the work.

On the 23rd May, 1917, the architect issued a certificate to the contractors for \$1,000, which amount was paid to them. Owing to the circumstances detailed above, no other payment became due or was made. The architect estimates the work done

and materials supplied at the date of this certificate as about \$1,200. The defendant Gardner puts it at from \$2,100 to \$2,200. Neither this nor other matters that seem to be important were gone into fully at the trial. According to the architect, the contractors did work and supplied materials after the issue of the certificate above referred to, and down to the time when they abandoned the contract, amounting to about \$400. There is again here a wide difference between the architect's figures and those of the defendant Gardner; but, under all the circumstances, I think I must accept the architect's figures.

An order was made on the 7th September, 1917, giving the conduct of the action to Hepburn & Disher Limited, who claimed to be lien-holders. The action came on for trial before me on the 18th September, 1917, after notice to all parties interested.

Hepburn & Disher Limited made a sub-contract with Ryan and Gardner to furnish the steel beams and some other materials for use in the building. The price was to be \$1,400; but, owing to some changes that were made, this was increased to \$1,423. The materials which Hepburn & Disher Limited agreed to supply were shipped in three or more several shipments from Toronto, and the last of the materials were delivered to the contractors, as I find, on the 23rd May, 1917. These materials were unloaded from the car on that day by the contractors, and placed by them in the street in front of the building. The claim for lien was registered by Hepburn & Disher Limited on the 23rd June, 1917.

At the trial I was inclined to hold that these claimants had not registered their claim for lien within the time allowed by the Act. But I have since reached a different conclusion. After the 23rd May, and until about the 7th June, 1917, the contractors continued to work on the building, and the notes of evidence shew that during that time some of the materials furnished by Hepburn & Disher Limited were placed on the land, and incorporated in the building. Consequently the claim for lien was registered within 30 days from the furnishing or placing of the last material so furnished or placed. The evidence shews that about \$750 worth of the materials furnished by Hepburn & Disher Limited went into the building, and the residue of these materials remained, at the date of the trial, on the street adjoining the land occupied by the building, where they had been placed by the contractors.

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As I understand the judgment of the Court in *Ludlam-Ainslie Lumber Co. v. Fallis* (1909), 19 O.L.R. 419, in order that a lien may arise in respect of materials furnished for use in a building, the materials must be placed on the land. Therefore the claim for lien of Hepburn & Disher Limited fails as to that part of it which relates to the materials left in the street. These were neither incorporated into the building, nor placed on the land, and never came under the control of the owners. I think, however, that Hepburn & Disher Limited are entitled to a lien to the extent of the materials furnished by them which actually went into the building, namely, \$750.

The plaintiffs the Milton Pressed Brick Company Limited are entitled to a lien for the amount claimed by them, viz., \$33.

The claim of the Sun Brick Company Limited is, as I understand, for bricks furnished to the contractors. These materials were apparently shipped from Toronto, and delivered to the contractors at Welland. None of them were incorporated in the building, nor placed on the land. These materials never came under the control of the owners, and at the time of the trial they were in the street adjacent to the land occupied by the building, where, I suppose, they were placed by the contractors. Under the circumstances, as I understand *Ludlam-Ainslie Lumber Co. v. Fallis*, the claim for lien fails.

Ralph Mitchell is entitled to a lien for wages, amounting to \$9.

There is, of course, no evidence of increased value, and the action should be dismissed as against the defendant White, the mortgagee.

Both Hepburn & Disher Limited and the Sun Brick Company Limited at the trial referred to sec. 16, sub-sec. 2, of the Act, and claimed to be entitled to a lien under that section on the materials respectively furnished by them. I do not think that section applies in the circumstances appearing in the case in hand.

The defendants Whalley and Toyn, the owners, set up a claim for damages against the contractors, and it appears to me that they are entitled to succeed. They have lost the contents of the rooms in the part of the building which collapsed, valued at \$1,000. It will cost to rebuild the collapsed part, according to the architect, \$6,126. There is a loss of revenue of \$50 per week; but, as to this item, there should be taken into consideration the upkeep and other

expenses in connection with the receipt and collection of this revenue. The architect estimated that it would take 3 months to rebuild. The building collapsed on the 7th June. Some time should be allowed to let contracts and make other arrangements. I think, perhaps, it would be fair to allow \$500 under this head.

Then there is to be considered the increased cost of carrying out the original contract, which, on the architect's evidence, I think I should place at \$1,400.

There is also the question of damages for delay. These are fixed by the contract at \$5 per day. The question whether this sum should be treated as a penalty or as liquidated damages was not gone into at the trial. No evidence was offered to shew what the actual damages caused by the delay in completion would be. The work was to have been completed by the 1st August, 1917. After the abandonment of the work by the contractors, nothing further had been done up to the time of trial. I think that a reasonable allowance to make under this head would be \$600. As against the owners' claim for damages may be set off any benefit they have derived from the work done up to the abandonment of the contract, say \$1,600, less the amount paid to the contractors, \$1,000, viz., \$600. On the basis above set forth, I assess the damages to which the owners are entitled at \$9,026.

The owners contend that, under the circumstances, there is nothing justly due and owing from them to the contractors, and therefore nothing upon which the liens claimed could attach. But, following the decision of the Court of Appeal in *Rice Lewis & Son Limited v. George Rathbone Limited* (1913), 27 O.L.R. 630, 9 D.L.R. 114, it would appear to me that when, on the 23rd May, 1917, the architect issued a certificate for \$1,000 in favour of the contractors, the owners should have deducted and retained from that payment for the benefit of lien-holders 20 per cent. of the value of the work and materials actually done, placed, or furnished, within the meaning of the Act, at that time. The value of this work and material, I find to be \$1,200. The owners are therefore liable for \$240 which they should have retained for the lien-holders; and, following the case above referred to, I hold that they cannot set off against this sum their claim to damages. Upon payment of this sum into Court, however, by the owners, for the benefit of the lien-holders, the liens registered should be vacated and discharged.

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Failing payment into Court of this sum within 30 days from the date of the formal judgment to be signed, the land should be sold, under the provisions of the Act.

The defendants Whalley and Toyn, the owners, are entitled to judgment against the contractors, Ryan and Gardner, for \$9,026 damages.

The Sun Brick Company Limited is entitled to a personal judgment against the defendants Ryan and Gardner for the amount of its claim.

The lien-holders' rights will be worked out under the formal judgment to be settled and signed by me, in accordance with the views above set forth. The question of costs was not referred to at the trial, and I shall hear the parties as to this, upon the settlement of the formal judgment.

The "formal judgment" was as follows:—

This action coming on for trial before His Honour L.B.C. Livingstone, Judge of the County Court of the County of Welland, upon opening the matter, and it appearing that the following persons have been duly served with notice of trial herein, the Sun Brick Company Limited, James Smith, Sheriff, assignee of Ryan and Gardner, Ralph Mitchell, and the defendants, and all such persons appearing at the trial, and upon hearing the evidence adduced, and what was alleged by counsel for the plaintiffs (Hepburn & Disher Limited being named as plaintiffs with the original plaintiffs) and for the defendants and for the Sun Brick Company Limited and Ralph Mitchell.

1. This Court doth declare that the several persons mentioned in the first schedule hereto are respectively entitled to a lien under the Mechanics and Wage-Earners Lien Act upon the land described in the second schedule hereto, for the amounts set opposite their respective names in the second, third, and fourth columns of the said first schedule and the persons primarily liable for the said claims respectively are set forth in the fifth column of the said schedule.

2. This Court doth further order and adjudge that, upon the defendants Percy R. Whalley and George Albert Toyn paying into Court to the credit of this action the sum of \$240 on or before the 27th day of December next, 1917, the said liens in the first schedule

mentioned, upon the respective estates and interests in the said lands of the said defendants, be and the same are hereby vacated and discharged and the said moneys so paid into Court are to be paid out in payment of the claims of the said lien-holders.

3. But in case the said defendants Percy R. Whalley and George Albert Toyn shall make default in payment of the said moneys into Court as aforesaid, this Court doth further order and adjudge that all the estate, right, title, and interest of the said defendants Percy R. Whalley and George Albert Toyn in the said lands be sold with the approbation of the Local Master of this Court, and that the purchase-money be paid into Court to the credit of this action, and that all proper parties do join in the assignments and conveyances as the said Master shall direct.

4. And this Court doth further order and adjudge that the said purchase-money be applied in and towards payment of the claims of the said lien-holders, with subsequent interest and subsequent costs, to be computed and taxed by the said Master as the said Master shall direct.

5. And this Court doth further order and adjudge that, if the money paid into Court, or, in case of a sale, the said purchase-money, shall be insufficient to pay in full all the plaintiffs' said claims, the defendants John Gardner and T. E. Ryan do pay the plaintiffs the amount remaining due to them forthwith after the same shall have been ascertained by the said Master.

6. And this Court doth declare that the said plaintiffs Hepburn & Disher Limited have not proved any lien for the sum of \$673, value of materials placed upon the street, and they are not entitled to a lien therefor; but this Court doth further order and adjudge that the said Hepburn & Disher Limited do recover against the defendants T. E. Ryan and John Gardner the sum of \$673.

7. And this Court doth declare that the Sun Brick Company Limited have not proved any lien under the Mechanics and Wage-Earners Lien Act, and they are not entitled to such lien; and this Court doth order and adjudge that the claim of lien registered by the said company against the land mentioned in the said second schedule be and the same is hereby discharged and vacated; and this Court doth further order and adjudge that the said Sun Brick Company Limited recover against the defendants T. E. Ryan and John Gardner the sum of \$526 and costs, which are hereby fixed at \$50.

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8. This Court doth order and adjudge that Percy R. Whalley and George Albert Toyn do recover against the defendants T. E. Ryan and John Gardner the sum of \$9,026 damages and costs, which are hereby fixed at \$50.

9. And this Court doth further order and adjudge that this action be and the same is hereby dismissed as against the defendant Thomas F. White.

10. And this Court doth further order and adjudge that the said lien-holder Ralph Mitchell, being a wage-earner, is entitled to have his claim of \$9.50 paid in full in priority to the claims of all other lien-holders.

SCHEDULE 1.					
Names of lien-holders entitled to mechanics' liens.	Amount of debt and interest if any	Costs	Total	Total to be paid out of Court	Names of primary debtors.
Ralph Mitchell	9.00	.50	9.50	9.50	Ryan and Gardner
Milton Pressed Brick Company	33.00	69.45	102.45	70.82	Ryan and Gardner
Hepburn & Disher Ltd.	750.00	128.05	878.05	159.68	Ryan and Gardner
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	792.00	198.00	980.00	240.00	

The following were the grounds of appeal:—

(1) That the judgment was contrary to the law, the evidence, and the weight of evidence.

(2) That the learned Judge had no power or authority, under the provisions of the Mechanics and Wage-Earners Lien Act, to enter into the question of compensation by the defendants Ryan and Gardner for such damages as were found by him to be owing to the owners.

(3) That the learned Judge had no power or legal right to declare that the plaintiffs Hepburn & Disher Limited had not proved a lien for the sum of \$673, value of the materials placed upon the street, and that they were not entitled to a lien therefor on the said material.

(4) That the material mentioned in para. 6 of the judgment was material placed by the plaintiffs upon land to be used in connection with the erection of the building for the purposes enumerated in sec. 6 of the Act, within the meaning of sec. 16 (2) of the Act, and it should have been so declared, and the learned trial Judge erred in finding to the contrary.

February 4. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

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W. Proudfoot, K.C., for the appellants. The assignee, who is in possession of the goods in question, is not a party to the action, but was served with the notice of trial, and was sufficiently represented. The materials in respect of which a lien is claimed by the appellants, under sec. 16 of the Act, were held by the trial Judge not to have been "actually brought upon" the land, within the meaning of the Act, although they were brought as near to the land as was possible, and permission was obtained from the municipal authorities to place in the street material for which there was no room. It is submitted that the words of the statute are broad enough to cover the case, and that a sale of the material can be ordered under sec. 37 (5). We rely on sec. 6, and also on sec. 37 as giving an implied authority. The following cases were referred to: *Ludlam-Ainslie Lumber Co. v. Fallis*, 19 O.L.R. 419, *per* Clute, J., at p. 424; *Kalbfleisch v. Hurley* (1915), 34 O.L.R. 268, 25 D.L.R. 469; *Larkin v. Larkin* (1900), 32 O.R. 80, *per* ROSE, J., at p. 94.

G. H. Pettit, for the respondents, relied upon the decision of the learned trial Judge, and on the plain meaning of the words used in the statute as interpreted by him.

Proudfoot, in reply.

March 19. The judgment of the Court was read by HODGINS, J.A.:—This appeal cannot succeed under the present condition of the law. The Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, gives extensive protection to material-men who supply materials "to be used," but the lien so declared is upon the land and erection which it is intended to benefit. In the case of materials supplied, it is given upon the land "upon which such materials are placed or furnished to be used" (sec. 6*).

*6. Unless he signs an express agreement to the contrary . . . any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing . . . of any erection, building . . . or the appurtenances . . . for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building . . . and appurtenances, and the land occupied thereby or enjoyed therewith, or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner.

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The extent of this protection is discussed in *Larkin v. Larkin*, 32 O.R. 80; *Ludlam-Ainslie Lumber Co. v. Fallis*, 19 O.L.R. 419; and *Kalbfleisch v. Hurley*, 34 O.L.R. 268, 25 D.L.R. 469.

But here a lien is also claimed by the appellants on their own goods. These had been sold to the contractors, who have since failed. They were delivered on the street in front of the building and land in question, but never actually reached the latter.

Mr. Proudfoot asked for whatever lien his clients were entitled to. But no case has yet decided that a lien under the Mechanics and Wage-Earners Lien Act, either on the land or on the material itself, exists by mere appropriation of goods to a contract, or on delivery to the owner or contractor, unless they are placed upon or reach the lands to be affected. The difficulties in the way of any other method of establishing a lien are many. If a contractor for half a dozen different houses buys steel or concrete by wholesale and stores it in his yard, it is in one sense delivered to be used in certain buildings. A car of lumber for a particular building may be bought in Buffalo f.o.b. there. It is intended to use it in a building and on certain land. Yet it would be impossible to give the wholesaler or the lumber merchant a lien upon the land merely because there was in his mind and that of the contractor an intention to devote the material in whole or in part to the erection of a building or buildings upon certain specified land. The difficulty of any other construction of the Act than the one now stated was pointed out by Clute, J., in the *Ludlam* case (*ante*). With regard to the lien upon the materials themselves, the statute is explicit in creating it only when they have reached the land to which it is intended to attach them and from which they cannot be removed (sec. 16*) to the prejudice of any lien.

The general lien under sec. 6, and the special one in the nature of a vendor's lien upon the material itself, depend upon the same condition, i.e., the placing upon the land to be affected of the material in question. Proximity to the land is not enough; it must

*16.—(1) During the continuance of a lien no part of the material affected thereby shall be removed to the prejudice of the lien.

(2) Material actually brought upon the land to be used in connection with such land for any of the purposes enumerated in section 6, shall be subject to a lien in favour of the person furnishing it until placed in the building, erection or work, and shall not be subject to execution or other process to enforce any debt other than for the purchase thereof, due by the person furnishing the same.

be on it, so that either in fact or in contemplation of law the value of the land itself is enhanced by its presence.

The damages suffered by an owner owing to non-completion, while not available to him as a set-off against claims for wages, nor to diminish the statutory percentage required to be retained by him, may be and in some cases must be gone into before the Master or Judge trying a case under the Mechanics and Wage-Earners Lien Act. To ascertain the sum justly due from the owner to the contractor necessitates an inquiry, where a case is made for it, as to the value of the work done under the contract as well as the damages suffered, and to be set off or deducted, for work undone or improperly done or for delay.

If this inquiry is proper, then the provisions of sec. 37, sub-sec. 3*, of the Mechanics and Wage-Earners Lien Act seem wide enough to allow the result to be put in the judgment directed to be pronounced by the Master or Judge trying the action.

The appeal should be dismissed.

[See now sec. 4 of an Act to amend the Mechanics and Wage-Earners Lien Act, assented to on the 26th March, 1918, 8 Geo. V. ch. 29.]

*37.— . . . (3) The Judge or officer shall try the action and all questions which arise therein or which are necessary to be tried in order to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before him or upon whom the notice of trial has been served, and shall take all accounts, make all inquiries, give all directions, and do all other things necessary to finally dispose of the action and of all matters, questions, and accounts arising therein or at the trial, and to adjust the rights and liabilities of and give all necessary relief to all parties to the action and all persons who have been served with the notice of trial, and shall embody the results in a judgment, Form 7.

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RE MCCONKEY ARBITRATION.

Landlord and Tenant—Ground Lease—Buildings of Tenant—Covenants and Provisoes in Lease—Determination by Arbitration of Value of “Buildings and Improvements” at Expiration of Lease—Construction of Lease—“Buildings Fixtures or Things”—“Buildings Erections or Improvements”—Mode of Valuation—“Abstractedly”—“Just and Proper Value”—“Renewal Value”—Use and Value to Landlord—“Fixtures” Forming Integral Part of Premises—Case Stated by Arbitrators—Arbitration Act, sec. 29—Forum—Single Judge in Court—Judicature Act, sec. 43.

A case stated by arbitrators, under sec. 29 of the Arbitration Act, R.S.O. 1914, ch. 65, for the determination of the Court, is now to be heard by a Judge in the Weekly Court: Judicature Act, R.S.O. 1914, ch. 56, sec. 43.

Re Geddes and Cochrane (1901), 2 O.L.R. 145, distinguished.

A lease of land contained a covenant by the lessor to pay, after the expiration of the term, the “just and proper value,” at the time of the expiration, “of such buildings and improvements as may then be erected and standing on the said hereby demised premises;” such value to be determined by arbitration; proviso, “that in determining the amount of the worth or value of any buildings erections or improvements standing and being upon the said demised premises at the end of any twenty-one years the said arbitrators are to judge of such buildings erections and improvements abstractedly and without reference to site or renewal value but are only to consider the cost of erection and deducting for age decay wear and tear and damages sustained.” In other parts of the lease various expressions were used, such as: “all future erections,” “buildings fixtures or things now or hereafter to be erected or being on the demised premises.” There was no covenant permitting the lessee to remove his fixtures. An arbitration to fix the value of the buildings upon the demised premises having been begun, the arbitrators stated a case for the determination of the Court:—

Held, that the words to be interpreted were those in the covenant to pay “buildings and improvements,” and not “buildings fixtures or things,” or “buildings erections or improvements;” and that the words actually used in the covenant to pay were not to be cut down so as to exclude “fixtures and things” or “erections.”

Held, also, that the “just and proper value” at the expiration of the lease was to be determined in accordance with the proviso, which required the “worth or value” of the buildings to be determined “abstractedly,” without reference to site or renewal value, and on the basis of “cost of erection,” less depreciation; these expressions meant that there should be excluded from the consideration of the arbitrators the element of suitability for the particular site and the “renewal value” of the buildings—the value was to be judged in the abstract, apart from the local situs or particular use, and upon the basis of cost only. The landlord was not to have any advantage from increase in the value of materials etc., nor to have saddled upon him any loss due to the decrease in value or the improvident bargain of the tenant. “Renewal value” did not mean cost of replacement, but the value upon the renewal of the lease, as a factor in determining the rent.

Held, also, that the element of use and value to the landlord was not a factor in the valuation.

Held, also, that the words “buildings and improvements” did not include purely chattel property; effect must be given to the other words used, “erected and standing on the . . . demised premises;” and all that in any fair sense fell within this description, if in good faith brought upon the demised premises and forming an integral part thereof, must be paid for by the landlord.

CASE stated by arbitrators, under sec. 29 of the Arbitration Act, R.S.O. 1914, ch. 65, upon an arbitration to determine the value of buildings upon demised premises.

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See *Re Toronto General Trusts Corporation and McConkey* (1917), 41 O.L.R. 314.

March 8. The case was heard by MIDDLETON, J., in the Weekly Court, Toronto.

E. T. Malone, K.C., for the landlord.

M. H. Ludwig, K.C., and *A. W. Ballantyne*, for the tenant.

March 20. MIDDLETON, J.:—A preliminary objection was made, based on *Re Geddes and Cochrane* (1901), 2 O.L.R. 145, to the case being heard in Weekly Court. When that case was determined, it was provided that, when a proceeding was directed to be taken before the Court in which the decision of the Court is final, the matter should be heard before a Divisional Court of the High Court (Judicature Act, R.S.O. 1897, ch. 51, sec. 67 (1) (a)). There being no appeal provided from the order pronounced upon a stated case under the Arbitration Act, it was held that the stated case must be heard by a Divisional Court.

But sec. 67 (1) (a) has been repealed, and the only section applicable is sec. 43 of the present Judicature Act, R.S.O. 1914, ch. 56, which requires all proceedings in the High Court Division to be heard and disposed of by a Judge, who shall constitute the Court.

The arbitration is under a lease dated the 1st November, 1896, made by Richardson to Wilson. In this lease is a covenant by the lessor to pay, after the expiration of the term, "the just and proper value at that time (namely at the expiration of the said term) of such buildings and improvements as may then be erected and standing on the said hereby demised premises"—such value to be determined by arbitration—or grant a new lease at a rental to be determined by arbitration. The arbitration is to fix the value of the buildings.

At a later page in the lease there is found this proviso:—

"Provided always that in determining the amount of the worth or value of any buildings erections or improvements standing and being upon the said demised premises at the end of any twenty-one

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years the said arbitrators are to judge of such buildings erections and improvements abstractedly and without reference to site or renewal value but are only to consider the cost of erection and deducting for age decay wear and tear and damages sustained."

Under the lease the tenant may refuse to renew, and in such case the lessor is to pay two-thirds of the value of the buildings and improvements upon the demised premises, to be determined in the same way.

The expression used in the covenants to pay in the alternative events is the same—it is to pay the value (or two-thirds of the value) of "such buildings and improvements" as may be upon the premises at the expiry of the term.

In other parts of the lease various expressions are used with astonishing irregularity and laxity.

There is first a covenant to keep and maintain on the demised premises one or more stores or houses to be composed of good brick, stone, or iron, or other substantial material, of the value of not less than \$4,000: and in the same clause a covenant to insure the stores and houses now erected and "all future erections."

There is then the covenant to pay, already quoted, and a proviso for arbitration wherever there is any question touching the value "of any buildings fixtures or things now or hereafter to be erected or being on the demised premises."

And then the proviso quoted as to the way in which the value of "any buildings erections or improvements" is to be determined. I cannot bring myself to the view that the use of these varying expressions in any way modifies or controls the words of the main covenants, or that the words actually used in these covenants are to be read as modified or controlled by the expressions in the other parts of the lease.

The covenant is to pay for "buildings and improvements" upon the demised premises, and these are the words that must be interpreted, and not the words "buildings fixtures or things," or "buildings erections or improvements."

Nor should the words actually used in the covenant to pay be cut down from their natural meaning so as to exclude from their meaning all that might be more aptly described as "fixtures and things," or as "erections," because these words are found in other parts of the lease and not in the covenant in question. The texture of the whole document is too lax for that.

A series of questions upon the interpretation of the lease are now propounded by the arbitrators, who deem it expedient to have them resolved before they proceed with the arbitration.

The first question relates to the proviso as to the mode of valuation quoted.

The landlord contends that the value of the buildings and improvements must be ascertained on the basis of the actual cost of erection, and from the actual outlay there is to be deducted some proper sum for depreciation due to age, decay, wear and tear, and damage sustained.

The fundamental idea is indemnity for cost, less depreciation due to age and use.

The tenant contends that "cost of erection" means what it would cost to erect at the expiry of the lease, less the amount proper to allow by reason of the buildings being old and more or less decayed and depreciated by wear and tear—the fundamental idea being that the landlord is to pay the value of what he receives, that is, what it would cost to build now, less depreciation by age and use.

It is said that the cost of building has advanced so much between the actual date of erection and the expiry of the term that on the right solution of this problem a considerable sum depends. Both material and wages have doubled in cost, it is said.

The meaning of the expression used must be the same whether cost has advanced or declined; but, as usual in all cases of sale, the arguments are shifted from vendor to purchaser as the market rises and falls.

The main covenant affords the key—the landlord is to pay "the just and proper value at that time," i.e., the expiry of the lease, and this value is to be determined in accordance with the proviso.

This requires the "worth or value" of the buildings to be determined:—

- (a) "Abstractedly."
- (b) Without reference to site or renewal value.
- (c) On the basis of "cost of erection," less depreciation.

From this proviso, I do not gather any intention to depart from the requirement of the covenant that the value shall be the just and proper value at the expiration of the lease, but rather

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an intention to exclude from the consideration of the arbitrators the element of suitability for the particular site and the "renewal value" of the buildings. This is what is meant by the unusual phrase "abstractedly."

The value is to be judged in the abstract, apart from the local situs or particular use, and upon the basis of cost only.

It was not the intention to give to the landlord any advantage arising from increase in value of materials etc., nor to saddle upon him any loss due to the decrease in value or the improvident bargain of the tenant.

"Renewal value" does not mean cost of replacement, but the value upon the renewal of the lease, as a factor in determining his rent.

The second question is: "Are the arbitrators to include only such buildings and erections as will be a benefit to the demised premises and to the owner thereof and to exclude improvements made or erected by the lessee for his special business purposes and which are of value only to a person who may carry on a similar business to that carried on by the lessee at the termination of his tenancy?"

The covenant is to pay the value of all "buildings and improvements" erected and standing on the demised premises, to be determined in the manner pointed out in the proviso. The element of use and value to the landlord or any new tenant is not a factor in the valuation.

Next the question is asked, "Are fixtures, 'buildings and improvements' within the covenant?"

According to *West v. Blakeway* (1841), 2 M. & G. 729, "improvements" is a word of large significance; and, when it is used in a lease, it is intended to have a wider and less technical operation than the word "fixtures."

I do not think this would cover purely chattel property, but that due weight must be given to the other words used, "erected and standing on the . . . demised premises;" and that all that in any fair sense falls within this description, without entering into any technical discussion as to landlord's fixtures, tenant's fixtures, or trade-fixtures, if in good faith brought upon the demised premises and forming an integral part thereof, must be paid for by the landlord.

It is not without importance to notice that there is not in the lease the statutory or any covenant permitting the tenant to remove his fixtures.

Unless there is some agreement as to costs, I make no order as to them.

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TEMISKAMING TELEPHONE CO. LIMITED v. TOWN OF COBALT.

March 21.

Telephone Company—Powers of—Right to Maintain Poles and Wires in Streets of Town—Company Incorporated in 1905 by Charter Issued under Ontario Companies Act—Seal of Province—Charter Preceding Incorporation of Town—Rights under Charter—Act to Prevent Trespasses to Public Lands, R.S.O. 1897, ch. 33, sec. 1—Agreement with Town Corporation—Permission to Use Streets—Monopoly for Five Years—Municipal Act, 1903, secs. 331, 559—6 Edw. VII. ch. 34, sec. 20—2 Geo. V. ch. 38, secs. 8 (1), 39—Municipal Franchises Act, R.S.O. 1914, ch. 197.

A telephone company has not the right to plant poles upon a highway without sanction derived from the Legislature or from Parliament. The municipality has no inherent legislative power to grant the right; and, unless there is to be found some authority emanating from Parliament, when the undertaking is under the jurisdiction of Canada, or from the Legislature, when the undertaking is under the jurisdiction of the Province, or from the municipality, when the Legislature has given power to the municipality, this non-natural use of the highway is unlawful.

Domestic Telegraph Co. v. Newark (1887), 49 N.J. Law 344, 346, approved.

A charter creating a company confers upon it the powers of a natural person so far as such powers are enumerated. A company which has power under its charter to own and operate a telephone line has no right to exercise that power until it acquires it in accordance with the general law of the land.

The plaintiff company was incorporated on the 5th April, 1905, by charter issued pursuant to the Ontario Companies Act, under the seal of the Province, with power to carry on in the District of N. the general business of a telephone company and for that purpose to construct, erect, maintain, and operate telephone lines upon public highways, subject however to the consent and control of the municipal councils having jurisdiction in the municipalities in which the lines should be constructed and operated. The Town of Cobalt was not incorporated until seven months later. The plaintiff company constructed lines, portions of which ran across parts of the lands now included in the town, following in a general way certain of the streets and roads now existing, before the incorporation of the town. After the incorporation, other lines were constructed within the town-limits without any municipal sanction. In 1912 an agreement, authorised by a by-law of the town, was made between the company and the town corporation, by which (1) the town corporation consented to the company exercising its powers by constructing, maintaining, and operating its lines upon any highway or public place within the limits of the town, under the direction of the town engineer; and (7) the town corporation agreed that it would not, during the period of five years, give to any person or company (other than the Temiskaming and Northern Ontario Railway Commission and the plaintiff company) any license or permission to use the highways in the town for the purpose of carrying on a telephone business. At the expiration of the five years mentioned in clause 7, the municipal council considered that the right of the company to maintain its poles and wires upon the streets of the town came to an end. This action was brought to establish the company's right:—

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Held, that until a date subsequent to the making of the agreement referred to, the town council had no power beyond that conferred by sec. 331 of the Municipal Act, 1903; and, under that section, the right to operate as a monopoly for the period of five years could alone have been given.

Section 559 of the Municipal Act, 1903, sec. 20 of 6 Edw. VII. ch. 34, and secs. 8 (1) and 39 of 2 Geo. V. ch. 38, considered.

The charter of the company, issued under the Companies Act, was not issued by the action of the Legislature; nor could it be regarded as a grant of Crown property. Any such grant must be, not under the seal of the Province, but under the hand and seal of the Lieutenant-Governor: sec. 1 of an Act to Prevent Trespasses to Public Lands, R.S.O. 1897, ch. 33.

The whole scheme of the Companies Act is to confer power upon the companies chartered, and it gives no right to those issuing the charter to deal with the rights of the public upon highways or to interfere with the public domain.

The provisions of the Municipal Franchises Act, R.S.O. 1914, ch. 197, do not apply to a telephone company.

The plaintiff company had not established a right to continue to maintain and operate its lines upon the streets of the town.

ACTION for a declaration of the plaintiff company's right to maintain and operate its telephone system in the town of Cobalt; for an injunction restraining the defendant, the Municipal Corporation of the Town of Cobalt, from interfering with the plaintiff company's poles and wires; and for damages.

January 14, 15, and 16. The action was tried by MIDDLETON, J., without a jury, at Toronto.

I. F. Hellmuth, K.C., *M. H. Ludwig*, K.C., and *F. L. Smiley*, for the plaintiff company.

H. H. Dewart, K.C., and *W. N. Tilley*, K.C., for the defendant corporation.

March 21. MIDDLETON, J.:—The question involved in this action is the right of the plaintiff company to maintain and operate its telephone system in the town of Cobalt. The defendant claims that it has the right to prevent the plaintiff company from using the streets of the town for its pole-lines, and to require it to remove its poles and wires.

Coleman township was first surveyed in 1904; the instructions were given on the 16th May, and the plan is dated the 1st October.

Mining locations were patented from that time on. Patents have been put in as follows:—

27th October, 1904: part R.L. 401 to M. J. O'Brien.

4th February, 1905: part R.L. 401 to Nipissing Mining Co.

25th May, 1905: T.S. 14 to Duncan M. Martin.

11th December, 1906: R.L. 400 & W. part R.L. 402 to M. J. O'Brien.

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27th May, 1908: J.B. 4 to LaRose Mines Limited.

On the 19th January, 1906, by an order in council, the "town-site," as shewn upon the survey, was vested in the Temiskaming and Northern Ontario Railway Commission, under "An Act to amend The Temiskaming and Northern Ontario Railway Act," 4 Edw. VII. ch. 7, sec. 3 (O.)

On the 1st December, 1906, the Town of Cobalt was incorporated, and the "town-site" and some adjacent territory were included in the limits. By a subsequent order in council, additional territory was included, but this is not of importance here.

On the 5th April, 1905, the plaintiff company was incorporated by charter, under the seal of the Province, under the Ontario Companies Act, with power:—

"To carry on within the District of Nipissing the general business of a telephone company and for that purpose to construct erect maintain and operate a line or lines of telephone along the sides of or across or under any public highways roads streets bridges waters watercourses or other places subject however to the consent to be first had and obtained and to the control of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and operated and to such terms for such times and at such rates and charges as by such councils shall be granted limited and fixed for such purposes respectively."

The date of the charter is important, as the Town of Cobalt was not incorporated until some seven months later, and the Township of Coleman was not organised until the 14th April, 1906.

On the day before the incorporation of the company, the 4th April, 1905, the Haileybury and Cobalt Telephone Company received a similar charter.

Both companies constructed lines, and portions of these lines ran across certain portions of the lands now included in the town, following in a general way certain of the streets and roads now existing, before the incorporation of the town. The main lines led from Cobalt and the mines in and near it to Haileybury.

The Haileybury and Cobalt Telephone Company went into liquidation, and its liquidator sold all its assets to the plaintiff

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company on the 15th April, 1906. After the incorporation of the town, other lines were constructed within the town-limits without any municipal sanction.

On the 2nd April, 1910, an agreement was made between the town and the company, by which the town was permitted to use the poles of the company, but it is provided that the "agreement shall not be construed in any way as an admission by the said corporation that the said company has any right, privilege, or franchise of any kind whatsoever to erect the telephone poles of the said company in the streets of the town of Cobalt or to string wires or other apparatus thereon."

In view of this provision, I do not regard this agreement as of any importance.

In 1912 an agreement was authorised by by-law 202 of the town. This agreement bears date the 19th June, 1912.

There is first the recital:—

"Whereas the company is about to make such changes to its system at the town of Cobalt and in the neighbourhood thereof as will enable it to secure a long distance connection for its subscribers at that exchange and has expended a considerable sum to that end and intends making further expenditure for that purpose and has petitioned the town before the expenditure of any further sum to make definite the rights of the company to the use of the streets of the town."

The important clauses of the agreement are:—

"1. The town hereby consents to the company exercising its powers by constructing, maintaining, and operating its lines of telephone upon, along, across, or under any highway, square, or other public place within the limits of the town, provided the opening up of such highway, square, or other public place for the erection of poles, or for carrying wires underground, shall be done under the direction and supervision of the town engineer, or such other officer as the town may appoint, and that the surface of such street or other public place shall in all cases be restored to its former condition by and at the expense of the company."

"7. The town agrees that it will not, during the period of five years from the 19th day of June, 1912, give to any person, firm, or company (other than the Temiskaming and Northern Ontario Railway Commission and the Temiskaming Telephone Company

Limited) any license or permission to use any highway, square, or other public place within the limits of the town for the purpose of placing in, upon, over, or under any such highway, square, or other public place within the limits of the town, any poles, ducts, or wires for the purpose of carrying on a telephone business."

The remaining provisions relate to rates, the use of the poles for fire alarm system, and minor details.

By an agreement of the 5th April, 1916, some variation is made in matters of detail.

The municipal council considered that, on the expiry of the five years mentioned in this agreement, the right of the company to maintain its poles and wires upon the streets of the municipality came to an end, and notified the company to that effect and required the company to remove its poles, wires, and equipment from the streets; and, upon the company's refusing to do so, the municipality itself proceeded to cut down the poles and wires; and thereupon this action was brought.

The contention of the company is: first, that the company derives its right to operate from the charter which confers the right, subject to the consent of the municipal corporations; but that, as at the date of the charter and of the erection of the earlier lines there were no municipalities, no consent was necessary; and, when the municipalities were created, they were only entitled to regulate and control, but not to prohibit, the operation of any company then upon the ground.

In the alternative, it is contended that the agreement is a general consent to the operation of the company, both under its charter and under the authority of municipal law, and that such covenant, once given, is good for all time and cannot be revoked. The provision in clause 7 of the agreement in no way restricts the wide and general effect of the consent in clause 1, but is the further grant of an exclusive right for the period of five years under sec. 331 of the Municipal Act, 1903. At the expiry of the five years the right of the company to operate did not come to an end, but its right to a monopoly did, and the company from that time on became subject to competition.

Before dealing with these contentions it is convenient to set out the statutory provisions which relate to the matters in issue.

The Municipal Act, R.S.O. 1897, ch. 223, sec. 559 (4) (and the

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same section and sub-section in the Municipal Act, 1903), authorises the councils of cities, towns or villages to pass by-laws:—

“For regulating the erection and maintenance of electric light, telegraph and telephone poles and wires within their limits.”

By an amendment to the Act coming into effect on the 14th May, 1906 (6 Edw. VII. ch. 34, sec. 20), this section was repealed, and it was enacted that the councils of cities, towns, villages *and townships* might pass by-laws:—

“For permitting and regulating the erection and maintenance of electric light, power, telegraph and telephone poles and wires upon the highways or elsewhere within the limits of the municipality.”

In the present revision of the Municipal Act, R.S.O. 1914, ch. 192, this section has been changed again, and appears in this form, as sec. 399 (50):—

“Subject to the Municipal Franchises Act for regulating the erection and maintenance of electric light, power, telegraph and telephone poles and wires and poles and wires for the transmission of electricity upon the highways or elsewhere within the municipality.”

By the Municipal Act of 1903) and earlier statutes), power is granted by sec. 331, which at first sight would seem to be merely an exception to the general provisions of sec. 300 against the granting of a monopoly, but which may be, and I think is, far more radical.

The section enacts:—

“The council of every city, town and village may pass by-laws, granting from time to time, to any telephone company, upon such terms and conditions as may be thought expedient, the exclusive right within the municipality, for a period not exceeding five years at any one time, to use streets and lanes in the municipality for the purpose of placing in, upon, over or under the same, poles, ducts and wires for the purpose of carrying on a telephone business, and may on behalf of the municipal corporation, enter into agreements with any such company not to give to any other company or person for such period any license or permission to use such streets or lanes for any such purpose.”

In 1912, by 2 Geo.V. ch. 38, sec. 39, this section (331) is repealed; and, by sec. 8 (1) of that Act, it is enacted that the council may,

with the assent of the municipal electors, pass a by-law "granting to a telephone company, upon such terms and conditions as may be deemed expedient, the right to use any of the highways, squares, or lanes in the municipality for placing in, upon, over or under the poles, cables, ducts and other wires for the purpose of its business." And, by sub-sec. (2), this right may be "an exclusive right, limited to a period not exceeding five years at one time."

This statute had been passed at the time of the agreement of the 19th June, 1912, but it did not come into effect until the following 1st July (see sec. 40).

This is the first enactment that gives to a municipal council in general terms the power to grant to a telephone company the right to use the streets of the municipality.

But the repealed section must, I think, be taken not merely as enabling the granting of a monopoly, but as conferring upon the council the power to grant the right to use the streets for the purpose of a telephone line.

It may be that it was assumed that the council had the power to grant this right, and that all that was present to the mind of the draftsman of the section was the giving of the right to grant this privilege as a monopoly; but, if there was not in the municipality any inherent or conferred right to grant the privilege, the section as it stands is wide enough to permit it being granted as a monopoly.

The section in its amended form is much to be preferred, as it draws the distinction between the grant of the privilege under sub-sec. (1) and the grant of the monopoly under sub-sec. (2).

The existence of the sections as they stood after the amendment is to me cogent evidence that the Legislature did not consider the provision of sec. 559 as to "regulating" and "permitting and regulating" wide enough to cover the granting to the telephone company of the right to use the streets and highways.

Of a provision of this character it was said:—

"These powers of the corporation are, however, of a restrictive, not of a donative, character. They do not enable the corporation to give, grant, or confer any right, power, or privilege whatsoever upon the company. Their only function is to circumscribe, or impose conditions upon, the exercise by the company of the rights, powers, and privileges already conferred upon it by the Legislature." *British Columbia Electric R.W. Co. Limited v. Stewart*, [1913] A.C. 816, 824, 14 D.L.R. 8, 12.

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It is elementary that a telephone company has not the right to plant its poles upon a highway without sanction derived from the Legislature or from Parliament. The municipality has no inherent legislative power to grant the right; and, unless there is to be found some authority emanating from Parliament, when the undertaking is under the jurisdiction of Canada, or from the Legislature, when the undertaking is under the jurisdiction of the Province, or from the municipality, when the Legislature has given power to the municipality, this non-natural use of the highway is unlawful.

As well put in *Domestic Telegraph Co. v. Newark* (1887), 49 N.J. Law 344, 346:—

“The public easement in highways is vested in the public and can be divested by nothing short of an exercise of the sovereign power. . . . The Legislature, representing the public, may release the public right by vacating the highway, may modify the public use by granting a right to use the highway for a horse railroad, or may restrict the public use by granting a right to erect poles and other obstructions in the highway. What the Legislature may thus do it may delegate authority to do . . . Authority has frequently been conferred on municipalities. . . . But the delegation of such power must plainly appear, either by express grant or by necessary implication.”

Confining inquiry, in the first place, to the delegation of power to the municipal councils, I conclude from what has been said as to the sections quoted that until a date subsequent to the making of the agreement in question the municipality had no power beyond that conferred by sec. 331; and that, under this section, the right to operate as a monopoly for the period of five years could alone have been given.

I am not certain that this is what the agreement itself expresses. It may be that what was intended by the draftsman was to express by clause 1 the consent of the municipal council requisite under the charter, and that clause 7 was regarded as the exercise of the power of the municipality under sec. 331.

The letter of the 4th November, 1909, shews that this was the interpretation placed by the contracting parties on the Act as it then stood, as the solicitor for the plaintiff writes making “application for a franchise for the telephone company for five

years, the legal term permitted by the Municipal Act." This fact, and the passing of the by-law on the eve of the coming into force of the new Act, which required the assent of ratepayers, remove any sympathy one might have if convinced that the plaintiff company had spent money upon some other view of the law.

Little need be added to indicate that the other contention put forward by the plaintiff cannot prevail. The charter of the company, issued under the Companies Act, is not the action of the Legislature; nor can it be regarded as a grant of Crown property. Any such grant must be, not under the seal of the Province, but under the hand and seal of the Lieutenant-Governor: sec. 1 of an Act to Prevent Trespasses to Public Lands, R.S.O. 1897, ch. 33.

But the charter is the creator of the artificial person—the company—and the provisions of the charter must be regarded subjectively. They confer upon it the powers of a natural person so far as such powers are enumerated. A natural person has the power to own and operate a telephone line, but has not that right unless and until he acquires it. This company had the power under its charter, but it had not any right to exercise that power until it acquired it in accordance with the general law of the land. The whole scheme of the Companies Act is to confer power upon the companies chartered, and it gives no right to those issuing the charter to deal with the rights of the public upon highways or to interfere with the public domain.

Since the granting of the charter in question, sections have been added to the Companies Act (now found as R.S.O. 1914, ch. 178, sec. 153), relating to the incorporation and powers of companies intended to operate and control a public or municipal franchise; and this statute, read with the Ontario Telephone Act, R.S.O. 1914, ch. 188, and the Municipal Franchises Act, R.S.O. 1914, ch. 197, and other statutory provisions, makes a consistent and compact body of legislation, but this has been the result of growth. The difficulty has arisen from the fact that this company had its charter and the contract before the law had assumed its present form.

I have not overlooked the Municipal Franchises Act, but have concluded that its provisions do not apply to a telephone company.

The action fails for these reasons.

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Vendor and Purchaser—Agreement for Sale of Land—Title—“Title by Possession,” Meaning of—Identification of Land Described in Agreement with Land as Described in Conveyances to Vendor and Predecessors in Title—Parol Evidence—Admissibility—Effect of Evidence—Good Paper Title Shewn—Strip of Land not Forming Part of Lots Mentioned in Former Conveyance—Appurtenance—Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 15.

B. agreed to buy and R. agreed to sell a property described in the written agreement of purchase and sale as: “House and premises number 115 Wolseley street, Toronto, with appurtenances and vacant lot adjoining to the west (up to the east wall of house number 119 Wolseley street) having a frontage of at least 51 feet by an even width of at least 110 feet to Willis street in the rear; the said premises having a frontage on Wolseley and Willis streets.” There was a proviso in the agreement that the title should be “good and free from all incumbrances” and “not altogether or in part a title by possession.” In 1856, a parcel of land which the vendor said was the same as that which he now agreed to sell, was conveyed to a predecessor in title of the vendor by a deed in which the land was described as being composed of lots 3 and 4 on the south side of E. (now Wolseley) street as shewn on a plan of the property of H. adjoining the property of R. as surveyed by U., having a frontage on E. street of 52 feet by 117 feet 6 inches in depth to a lane, be the same more or less. And the same description was used in subsequent conveyances. The plan referred to was not registered; and none of the measurements on the ground corresponded with the deed. Evidence was taken by a Referee upon a reference directed by the Court when an application under the Vendors and Purchasers Act was made:—

Held, upon appeal from the Referee’s finding, that a title which depended at any point upon possession under the Statute of Limitations, and so was not wholly a paper title, was a title by possession, within the words of the agreement.

Held, also, that parol evidence was admissible to shew that “lots 3 and 4” was the name of the whole parcel occupied by the vendor and his predecessors in title and was the property described in the agreement, and that the acts of the parties might be given in evidence to interpret the description in the conveyance.

Waterpark v. Fennell (1859), 7 H.L.C. 650, *Lyle v. Richards* (1866), L.R. 1 1 H.L. 222, and *Van Diemen’s Land Co. v. Marine Board of Table Cape*, [1906] A.C. 92, followed.

And *held*, that the evidence established that for upwards of 29 years the block of land described in the agreement had been occupied as and for lots 3 and 4 by J. and son, first as tenants and then as owners; that the block was wholly enclosed either by buildings or walls; that the lands were so occupied by J. and son and their successors as of supposed right, and not as trespassers or intruders; and that the whole of the land described in the agreement was land to which the vendor had a paper title under the conveyance to him of lots 3 and 4.

And *semble*, that, if the westerly strip did not form part of lots 3 and 4, nevertheless under sec. 15 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, the whole of the land described in the agreement passed to the predecessors of the vendor as lots 3 and 4 and hereditaments appurtenant thereto.

McNish v. Munro (1875), 25 U.C.C.P. 290, and *Hill v. Broadbent* (1898), 25 A.R. 159, distinguished.

Willis v. Watney (1881), 45 L.T.R. 739, *Winfield v. Fowlie* (1887), 14 O.R. 102, and *Fraser v. Mutchmor* (1904), 8 O.L.R. 613, followed.

Finding of the Referee in favour of the vendor’s title affirmed.

AN appeal by Brenzel, the purchaser, from the certificate of an Official Referee of his findings upon a reference as to title made to him by an order of a Judge upon an application under the Vendors and Purchasers Act, R.S.O. 1914, ch. 122.

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February 28. The appeal was heard by MASTEN, J., in the Weekly Court, Toronto.

Joseph Singer, for the purchaser.

H. Howard Shaver and *D. C. Ross*, for the vendor.

March 21. MASTEN, J.:—Appeal from the certificate of George S. Holmsted, Esquire, K.C., dated the 21st January, 1918, made by him under an order of Mr. Justice Clute, dated the 13th December, 1917.

The original application and the reference are under the Vendors and Purchasers Act; the application I understand to be a summary substitute for an action for specific performance. The contest is exclusively between the vendor and the purchaser over the terms of an agreement of sale, and neither Rule 603 nor the Quieting Titles Act, R.S.O. 1914, ch. 123, have, in my view, any bearing on the case.

The agreement in question is for the purchase of all and singular the lands and premises described as follows:—

“House and premises number 115 Wolseley street, Toronto, with appurtenances and vacant lot adjoining to the west (up to the east wall of house number 119 Wolseley street) having a frontage of at least 51 feet by an even width of at least 110 feet to Willis street in the rear; the said premises having a frontage on Wolseley and Willis streets.”

The agreement is for the most part in the usual form, and the only term that needs specially to be referred to is the following:—

“Provided the title is good and free from all incumbrances save as aforesaid, and is not altogether or in part a title by possession.”

In 1834, the parcel of which the lands in question form a part was conveyed by one George Cruikshank to one George Houghton, under the following description:—

“All that parcel or tract of land situate lying and being in the liberties of the said City of Toronto containing by admeasurement one acre be the same more or less being composed of part of

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the front part of park lot number nineteen in the first concession from the bay in the Township of York in the District and Province aforesaid and designated by a certain plan of survey by Mr. James G. Chewett Deputy Surveyor as lot number ten on Lot street which said parcel or tract of land is butted and bounded or may be otherwise known as follows that is to say commencing on the south side of Lot street in front of the said lot number ten where a certain stake has been planted at the south-west angle of the said lot then north sixteen degrees west parallel to the western limit of the said lot number nineteen four hundred and sixteen feet then north seventy-four degrees east parallel to the front of the said lot number nineteen one hundred and four feet then south sixteen degrees east parallel to the western limit of the said lot number nineteen four hundred and sixteen feet to the front of the said lot then south seventy-four degrees west along Lot street and the front of the said lot one hundred and four feet to the place of beginning."

And on the 2nd April, 1856, what are alleged by the vendor to be the lands in question were conveyed by George William Houghton to John Bell, under the following description:—

"All and singular that certain tract or lot of land situate on Eden street in the said City of Toronto being composed of lots numbers three and four on the south side of Eden street as shewn on a plan of the property of the said George William Houghton adjoining the property of one John Ritchey as surveyed by Charles Unwin of the City of Toronto Esquire Land Surveyor having a frontage on Eden street of fifty-two feet by one hundred and seventeen feet six inches in depth to a lane be the same more or less."

And the subsequent dealings with the property have, so far as appears here, adopted this last description.

The certificate from which this appeal is taken assumes the form of a finding that the vendor can sufficiently answer requisitions 11 and 12 of the requisitions on title delivered herein by the purchaser.

The appeal from the certificate is upon the grounds following:—

(a) Because the said Referee of Titles has found that the vendor can sufficiently answer requisitions Nos. 11 and 12 of the requisitions on title delivered by the purchaser, whereas he should

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have found, on the evidence submitted to him, that the vendor cannot sufficiently answer requisitions Nos. 11 and 12 of the said requisitions.

“(b) Because the said Referee of Titles, upon the facts found by him, after hearing the evidence in this matter, as shewn in his reasons for judgment, should have found that the vendor cannot sufficiently answer the said requisitions on title.

“(c) Because the said Referee of Titles has arrived at an incorrect conclusion of law upon the facts found by him, as set out in his said reasons for judgment.

“(d) Because the said report is against the weight of evidence submitted to the said Referee.”

Requisitions 11 and 12 are as follows:—

“11. This property, according to all registered descriptions, seems to be described as lots Nos. 3 and 4 on an unregistered plan, having a frontage of 52 feet on the south side of Wolseley street, by a depth of 117 feet 6 inches. According to the agreement for sale, made with our client, we were to obtain the premises known as 115 Wolseley street, together with the lands adjoining, to the wall of 119 Wolseley street; and a survey of this property in our possession shews that these lands have a frontage of 53 feet 4 inches by a depth of 117 feet 11 inches. The previous owners obtain title to only 52 feet by a depth of 117 feet 6 inches, as above set out.

“Required production and registration of a proper grant from all parties interested in these lands so as to give our client a clear title to lands having a frontage of 53 feet 4 inches by a depth of 117 feet 11 inches.

“12. According to the description contained in the deed to your client and preceding descriptions, it is almost impossible accurately to locate the land which you convey to us. The lands are described as lots 3 and 4 on an unregistered plan, but there is nothing to shew that the lnds which you intend to convey to us are the said lots 3 and 4.

“Required evidence that the lands known as 115 Wolseley street and the vacant lot adjoining are the same as the lots 3 and 4 referred to in your deed.”

In respect to this the learned Referee says:—

“The vendor deduces an admittedly good paper title to the property in question so far as it includes lot 3 and part of lot 4

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according to an unregistered plan of Unwin, made about 1855, for the then owner of the property. But, by an actual survey of the property, it would appear that there is embraced within the boundaries of the property agreed to be sold a strip of about 2 feet 1 inch in width on Wolseley street and of varying width to Willis street, where it is 3 feet 8 inches in width, which is part of lot 2 according to the measurements given in Unwin's plan.

"As to this it is said no paper title can be shewn, and therefore it is contended that the defendant is unable to make a title to the whole of the property according to the terms of the proviso.

"What the defendant has shewn in regard to this strip is, that lots 3 and 4 were leased to Follis Johnston, and subsequently to his son of the same name, by the representatives of the Bell estate, who were the owners of the two lots, and that for upwards of 29 years the Johnstons, as such tenants of lots 3 and 4, occupied the whole of the land in question, including the strip of lot 2; that Johnston junior ultimately contracted to buy lots 3 and 4 from the Bell estate, and sold his right as purchaser to the vendor, to whom the representatives of the Bell estate have conveyed lots 3 and 4. By this conveyance, any right, title or interest acquired by the Bell estate, by virtue of the occupation of the Johnstons, has, in my opinion, passed to the vendor, under the deed from that estate, by virtue of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 15; and I do not think that counsel for the purchaser contends that it did not; his argument is, that the right of the Bell estate to the strip of lot 2 was acquired by possession, and therefore the title of their successors in title must also always be and remain merely possessory.

"In construing the proviso in question, I do not think it would be a reasonable construction to treat it as being a bargain for a title resting solely on deeds, because such a title might really be no title at all; what, it appears to me, the purchaser was really trying to guard against was being required to accept a title which, as to any part of the land in question, rested solely on possession. The title of the Bell estate, to lot 2, may be said to be within the category aimed at by the proviso; but, when the Bell estate conveyed its title to the vendor, can the vendor's title be said to rest in the whole or in part solely on possession? It seems to me that that question must be answered in the negative, because it rests

not solely on the possession of the Bell estate, but also on the conveyance from the Bell estate to him.

"My answer to the question submitted to me for report is, therefore, in the affirmative."

Two questions arise:—

First, assuming the facts to be as found by the Referee in his reasons for judgment, namely: that a portion of the lands described in the agreement of sale forms part of lot 2; that the title to such portion of lot 2 was acquired by the vendors' predecessors in title (namely the Bell estate), by force of the Statute of Limitations, and thereafter, by various mesne conveyances, became vested in the vendor; is the title so held by the vendor at the present time "a title by possession" within the meaning of the clause of the contract above quoted?

Secondly, is the Referee right in the finding set forth in his reasons for report that the lands described by him as part of lot 2 are at the present time part of the said lot 2 to which title has been acquired by the vendor in manner above set out; or do they in fact, upon the evidence here adduced, form part of lots 3 and 4 to which the vendor has a paper title?

With respect to the first question, if the learned Referee means by his finding to hold that the title to the strip of land which he describes as originally part of lot 2 became vested in the Bell estate by force of the Statute of Limitations, so that the title to the Bell estate was a title by possession, and if he means that, as a result of the subsequent conveyances from the Bell estate, such possessory title was converted into a paper title, I am unable to follow his reasoning.

"Possessory title" is defined in Murray's Dictionary as a title arising from possession. It has also been defined in the American Courts as a title gained by possession: see *Block v. Ryan* (1894), 4 App. D.C. 283, at p. 287. Its character is therefore determined by its origin, not by subsequent adventitious acts of transmission.

It appears to me that the words of the agreement are sufficiently plain and sufficiently clear to cover every case of a title which has at any time after the grant from the Crown been acquired by possession. If the title which the vendor shews and proves, traces back not to a patent from the Crown but to a break in the chain of paper title, and rests on a title acquired by

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possession under the Statute of Limitations, I think that such a title comes within the words of the agreement and is a title by possession.

With respect to the second question, it is contended on behalf of the purchaser that, when lands are described by a reference either expressly or by implication to a plan, the plan is considered as incorporated with the deed, and the contents and boundaries of the land conveyed as defined by the plan are to be taken as part of the description just as though an extended description to that effect was in the words contained in the body of the deed itself. This interpretation of the description in the deed is a matter of legal construction, and to be determined accordingly as a question of law by the Judge, and not as a question of fact by the jury (*Grasett v. Carter* (1884), 10 S.C.R. 105, at p. 114).

On the hearing before the learned Referee, the Chewett plan of 1835 and the Houghton plan of 1855 were taken as proved, and the purchaser contends that the vendor takes no more by paper title than so much of lots 3 and 4 as lie more than 146 feet west of Bathurst street; that 11 inches of the easterly portion of lot 4 has been lost to the adjoining easterly owner by his possession of such 11 inches; and that all that remains of lots 3 and 4 to which the vendor has a paper title is 52 feet, less 11 inches; that there remains, out of the lands agreed to be sold, a strip on Wolseley street with a frontage of 2 feet 1 inch in width, and elsewhere of varying width down to Willis street, where it is 3 feet 8 inches in width; that this strip does not form part of lots 3 and 4, but is in reality part of lot 2, and that to it the vendor has no paper title.

In answer it is urged, on behalf of the vendor, that the lands described in the agreement in question are covered by the description "lots 3 and 4;" that such is the name of this parcel in exactly the same way as though it was described by the name of "Black-acre" or "The Elms," or any like designation; that John Bell acquired the lands in question as and for lots 3 and 4 under a deed made to him by Houghton in 1856; and that the possession since acquisition by John Bell in 1856 has been a possession of these lands as lots 3 and 4, not a possession as trespassers or intruders; that it is always a question of fact for a jury what is in nature on the ground the particular parcel of land intended to be covered by the description in the deed; and that, upon the evidence

adduced in this case, the lands described in the agreement are in fact lots 3 and 4.

The evidence is by no means clear; but, after perusing it several times, the following conclusions appear to me to emerge.

Whether there were stakes planted by Unwin in 1855 is not shewn by the evidence, but in any case it appears clear that at the present time no traces are discoverable of any post, stake, or monument locating any boundary of lots 3 and 4; neither is there any fixed point from which measurements can be made by a surveyor so as to locate with accuracy the boundaries on the ground of lots 3 and 4. The surveyors are therefore unable to state the exact location of the boundaries of these lots.

With respect to Chewett's plan in 1835 and Unwin's plan in 1855, both of which are unregistered, no original plan signed by the surveyor or by the owner, nor any copy of such a plan, is proved in evidence. What is produced is the field-book of one Unwin, a Provincial Land Surveyor, marked as exhibit "M" on the hearing before the Referee, which field-book contains sketches purporting to correspond with Chewett's plan and Unwin's plan. Chewett is dead, and Unwin was not called as a witness. The surveyors can give no testimony as to whether these sketches are or are not accurate copies of the plans above mentioned. No doubt, under sec. 9 of the Quieting Titles Act, the evidence of these surveyors and of this field-book would be admissible; but in an action for specific performance or in such an application as this, I think it fails to establish the plans in question, or the measurements which they shew. The evidence appears to me to establish in a general way the location of lots 3 and 4 as being on the south side of Wolseley (formerly Eden) street, and immediately west of the lands conveyed to John Ritchey by deed of the 7th June, 1834, but the uncertainty as to the actual boundaries of the lands in question is emphasised by the descriptions of the abutting lands east and west. The lands formerly conveyed to one Ritchey and lying to the east of the lands in question occupy 146 feet 11 inches in width westerly from Bathurst street, instead of 146 feet, as mentioned in the deed, and the description of the lands to the west of the parcel here in question (being the residue of lot 10 on Chewett's plan) commences, according to the description in the vesting order of the 21st December, 1871, 205 feet westerly from

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Bathurst street, instead of 198 feet, and embraces as occupied 52 feet 4 inches, instead of 52 feet, called for by the deed.

I mention this circumstance merely as indicating that none of the measurements on the ground correspond with the deed.

The total distance from Bathurst street to Markham street has not been ascertained by any of the surveyors, and there is no evidence before the Court on that point.

It is clear upon the decisions that if there were marks upon the ground they would govern; also, if Unwin's plan made for Houghton, and which is referred to in the description, were registered, or if it were attached to the deed without registration, or indeed if the original plan itself were produced and proved, I think the vendor would (apart from the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 15) be governed by the description in the plan, and would, so far as his paper title goes, be confined to that. But here there is no plan. It is lost as much as the stakes on the ground, if there ever were any.

Any identification of the boundaries of lots 3 and 4, either by surveyors' posts or by the plans, being thus excluded, it only remains to consider whether the parol evidence of the witnesses Johnston and Rabinovitch is admissible to establish what land is covered by the description "lots 3 and 4," and, if so, what that evidence establishes.

In *Waterpark v. Fennell* (1859), 7 H.L.C. 650, at p. 678, Lord Chelmsford says:—

"Parol evidence is generally admissible to apply the words used in a deed, and to identify the property comprised within it. You cannot, indeed, shew that the words were *intended* to include a particular piece of land, but you may prove facts from which you may collect the meaning of the words used, so as to include or exclude a portion of land, where the words are capable of either construction."

In the case of *Lyle v. Richards* (1866), L.R. 1 H.L. 222, at p. 229, Lord Cranworth says:—

"It is the duty of the Judge to decide what was the true meaning of language there used for describing the boundary line. But in order to adapt the description, contained in a lease or other instrument, of a boundary line . . . to the line in nature meant to be designated by the description, it is necessary to have recourse to parol evidence."

In *VanDiemen's Land Co. v. Marine Board of Table Cape*, [1906] A.C. 92, Lord Halsbury thus deals with the question, at p. 98:—

"The circumstances under which modern user may be proved to explain a written instrument are treated of with great precision by the learned Judges who advised the House of Lords in *Waterpark v. Fennell*.

"The learned Judge stated, and stated quite correctly, that you cannot say that acts of user were acts of user under a grant when they were done before the grant existed. It does not follow that such acts were not relevant to be proved when, as in this case, they lead up to and explain what is afterwards granted.

"It would be a singular application of the maxim quoted by Coke, 2 Institutes, 11, *contemporanea expositio est fortissima in lege*, to suggest that the proof of user must be confined to ancient documents, whatever the word 'ancient' may be supposed to involve. The reason why the word is relied on is because the user is supposed to have continued, and thus to have brought us back to the contemporaneous exposition of the deed.

"The contemporaneous exposition is not confined to user under the deed. All circumstances which can tend to shew the intentions of the parties whether before or after the execution of the deed itself may be relevant, and in this case their Lordships think are very relevant to the questions in debate."

These cases, I think, establish that parol evidence, in the circumstances here existing, is admissible to shew that "lots 3 and 4" is the name of the whole parcel occupied by the vendor and his predecessors in title, and described in the agreement of sale, and that the acts of the parties may be given in evidence to interpret the description in the conveyance.

Turning then to the evidence of the witnesses Johnston and Rabinovitch, it establishes that for upwards of 29 years the lands described in the agreement of sale from the westerly limit of the house known as street No. 113 at the east, to the easterly limit of the structure known as street No. 119, at the west, were occupied by the Johnstons, father and son, as tenants of the Bell estate, or as owners; that the block was wholly enclosed either by buildings or walls; and that the lands were occupied by the Johnstons and their successors as of supposed right, and not as trespassers or intruders.

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I have felt some difficulty in finding, on the rather sketchy evidence which is here adduced, that the lands have been occupied during these years "as and for lots 3 and 4," but on the whole I think that may fairly be taken to be the effect of the evidence; and, with some hesitation, I so find.

The result is that I am of opinion that the strip which is described by the Referee as forming part of lot 2 does not in fact form any portion of lot 2, but that the whole of the lands described in the agreement of sale are, as a matter of fact, upon the evidence here disclosed, lands to which the vendor has a paper title under the conveyance to him of lots 3 and 4.

This suffices to dispose of the question before me; but, if it were necessary to the disposition of the case, I should be inclined to the view that, if the westerly strip does not actually form part of lots 3 and 4—as I think it does—under sec. 15 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, the whole of the lands described in the agreement of sale passed to the predecessors in title of the vendor as lots 3 and 4 and hereditaments appurtenant thereto, under the statute, and that they passed to the predecessors in title of the vendor, and so to him under the registered conveyances, as lands occupied and enjoyed as parts of lots 3 and 4.

In referring to that possible view, I have not overlooked the cases of *McNish v. Munro* (1875), 25 U.C.C.P. 290, at p. 295, and *Hill v. Broadbent* (1898), 25 A.R. 159, at pp. 168, 169; but it seems to me that the present case is broadly distinguishable in its facts from those cases, and is brought within the category of cases illustrated by *Willis v. Watney* (1881), 45 L.T.R. 739; *Winfield v. Fowlie* (1887), 14 O.R. 102; and *Fraser v. Mutchmor* (1904), 8 O.L.R. 613, at p. 615.

The result is, that the appeal is dismissed and the certificate of the Referee is confirmed, on other grounds.

Costs will follow the result.

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March 22.

RE RUTHERFORD.

Will—Construction—Devise of House and Premises—Addition to Premises after Date of Will—Whole Passing by Devise—Will Speaking from Death—“Contrary Intention”—Wills Act, sec. 27.

A testator, dying in 1912, by his will, made in 1907, gave his “house and premises on M. street” to his widow for life, and on her death or remarriage to his children then living, and the residue of his estate to her absolutely. At the date of the will, the testator owned a house in M. street built on 20 feet of land; the testator afterwards purchased and owned at his death 55 feet to the west:—

Held, a contrary intention not appearing by the will (sec. 27 of the Wills Act), that the will must be read as if it had been executed immediately before the testator’s death, and the whole property in M. street passed under the devise.

The established rule of construction is stated in *Re Ingram* (1918), *ante* 95.

When the thing given remains, and has been added to between the date of the will and the date of the death, the whole property answering the description at the later date passes.

In re Willis, [1911] 2 Ch. 563, *In re Portal and Lamb* (1885), 30 Ch. D. 50, *Morrison v. Morrison* (1885), 10 O.R. 303, and *Halton v. Bertram* (1887), 13 O.R. 766, referred to.

MOTION by the widow and residuary legatee under the will of Arthur Rutherford, deceased, for an order determining a question as to the meaning and effect of the will.

March 6. The motion was heard in the Weekly Court, Toronto.

C. W. *Livingston*, for the applicant.

A. C. *Heighington*, for the children of the testator’s first wife (adults).

F. W. *Harcourt*, K.C., Official Guardian, for infants in the same interest.

March 22. MIDDLETON, J.:—The testator died on the 15th February, 1912, having made a will dated the 28th March, 1907.

At the date of the will the testator owned a house on Merton street, supposed to be built on 20 feet of land, but a back porch and a walk leading to it and to the rear of the house were partly upon the land lying immediately to the west.

On the 18th October, 1910, the testator bought 55 feet to the west of his house, and this land has ever since been enclosed with the original 20 feet, and has been used as a garden, and a chicken-house was erected upon it.

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By his will the testator gave his "house and premises on Merton street" to his widow for life, and on her death or remarriage to his children then living.

The residue of his estate is given to the widow absolutely.

The wife claims that the "house and premises on Merton street" does not cover this 55 feet acquired after the will, and so is hers absolutely under the residuary devise.

In *Re Ingram* (1918), *ante* 95, I recently had to consider the cases upon sec. 27 of the Wills Act, and to refer to what I thought was the established rule of construction. The section in effect provides that, unless from the will itself you can see that the testator did not intend after-acquired property to pass, it must be read as though he had executed it immediately before his death. In many cases this must result in imputing to the testator an intention which in fact he never had; but, on the other hand, the opposite rule would even more frequently result in defeating his intention. This is at once apprehended where the expression used is general, e.g., where there is a gift of "my house" or "my horse," and the testator had sold his house or his horse and had bought another. The wife to whom he had given his house or the son to whom he had given his horse would not easily understand why nothing was given because of the sale of the property owned at the will's date. So this statute establishes the rule, as put by one Judge, that the testator must be assumed to have read his will or carried it in his mind till shortly before his death, and to have refrained from any change because it expressed his intention at that time.

Now two things have been frequently found in wills which the Courts have taken as an indication of a contrary intention. When a testator speaks of that which he gives as that which he owns at the date of the will, clearly that and that alone is given, for the provision is not that the will must in all respects be regarded as made immediately before the death.

Then, when the will speaks of a specific thing, and is not general in its provisions, the thing given must be determined by the language used by the testator. Nothing else passes, for nothing else is given. In this way Judges, always slow to recognise by decision the desirability of reform, cut down the full meaning and effect of the statute. But it has always been held that when the thing given remains, and has been added to between the date

of the will and the date of death, the whole property answering the description at the latter date will pass.

In re Willis, [1911] 2 Ch. 563, is a striking example. The testator gave his "freehold house and premises at O. known as A. in which I now reside." He bought two additional plots, one contiguous to the house, one across the road, and used them in connection with the house. Both plots passed—Eve, J., following the earlier case of *In re Champion*, [1893] 1 Ch. 101.

Although the holding in *In re Portal and Lamb* (1885), 30 Ch. D. 50, was that the after-acquired property did not pass because it was not included in the devise, the reasoning indicates what, in the opinion of the Lords Justices of Appeal, is the principle to be applied. I would emphasise the caution found in the judgment of Lord Justice Lindley as to the care necessary in applying the section, when what is before the Court is not whether the property passes by the will, but under which clause does it pass—is it part of the specific gift, or does it form part of the residuary estate? The statute is still to have its due effect, but no more. "If a testator devises all his lands in the parish of B., and then makes a residuary devise of all his other lands, the former devise will carry all other and which he may acquire in that parish under sec. 24 of the statute, unless there is an intention to the contrary" (p. 55).

In *Morrison v. Morrison* (1885), 10 O.R. 303, the principle of *In re Portal and Lamb* was accepted. The point of controversy was as to the effect of certain words in the residuary clause, which it was said indicated an intention that after-acquired property should pass under it. The majority of the Court thought that a contrary intention had been sufficiently expressed.

In *Hatton v. Bertram* (1887), 13 O.R. 766, the same Judges held, in a case very like the case in hand, that after-acquired property passed to the devisee of the residence.

For these reasons, I find that the whole property on Merton street passed under the devise of the "house and premises on Merton street."

Costs of all parties may be paid out of the residuary estate, if any, of the testator. If there is no residuary estate, no costs.

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[IN CHAMBERS.]

March 23.

DUELL V. OXFORD KNITTING CO.

Discovery—Examination of Plaintiff Residing Abroad—Place for Examination—Rule 328—"Just and Convenient."

One of the plaintiffs, in an action brought in the Supreme Court of Ontario, resided in New York, and an order was made, under Rule 328, requiring him to attend in Toronto for examination for discovery at the instance of the defendants. On appeal the order was varied so as to provide for the examination taking place in New York.

Ordinarily the place of residence of the person to be examined is the proper place for his examination; in this case no special circumstances were suggested; and it seemed "just and convenient" (Rule 328) that the examination should take place in New York.

APPEAL by the plaintiffs from an order of the Master in Chambers requiring the plaintiff Warfield to attend before a special examiner in Toronto for examination for discovery at the instance of the defendants. The plaintiff Warfield's place of residence was in New York.

March 15. The appeal was heard by MEREDITH, C.J.C.P., in Chambers.

P. E. F. Smily, for the plaintiffs.

J. W. Payne, for the defendants.

March 23. MEREDITH, C.J.C.P.:—The Master in Chambers has made an order that the plaintiff Frederic W. Warfield attend before a special examiner in Toronto and submit to examination for discovery in this action.

That plaintiff is quite willing to submit to such examination, but objects to being brought from his home and business in New York, to be examined in Toronto; and to that extent appeals against that order.

The authority for making such an order against a party who is out of Ontario, is contained in Rule 328, which provides for the examination of "a party . . . out of Ontario" taking place "at such place and in such manner as may seem just and convenient."

The order in question, in so far as it is objected to, is unfair and very inconvenient to the party to be examined, who ought to be, ordinarily, the first person to be considered. He is an

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attorney and counsellor at law, actively engaged, it is said, in a large practice in New York. It hardly needs the assertion, which has been made by him, that coming to Toronto for such an examination would cause him much inconvenience and considerable loss.

To the defendants, so far as fairness and convenience go, it can make no difference whether the examination take place in New York or in Toronto. There is no need for them to attend.

And in so far as the plaintiffs' solicitors are concerned, as they are actively opposing an examination in Toronto and advocating one in New York, it may be taken that they deem the latter fairer and more convenient.

So that in truth it is only the defendants' solicitors to whom an examination in Toronto would be more convenient; and mainly if not altogether so only because, in that case, they should not be obliged to pay any agency fees: and it might be less convenient instructing counsel by letter than by word of mouth.

Fairness and convenience are therefore quite against the order which has been made, and in favour of an examination in New York; where, it need hardly be said, examiners and counsel may be had who are quite as competent as any whose services could be had elsewhere.

It is said—but I should think mistakenly said—that the learned Master did not deal with this question from that point of view; that he considered the plaintiff Warfield bound to come to this Province because he had brought his action here. But the terms of the Rule are unmistakable: and an application of this character must not be confused with an application made by a plaintiff to have his own evidence taken, by way of a commission, to be used at the trial, instead of giving it at the trial in the presence of Judge and jury.

Under ordinary circumstances, fairness and convenience require that, when one person is required to testify at the instance of another, the examination should take place where the person examined resides. Such a person may well feel that it is bad enough to have to submit to the inconvenience of an examination at his most convenient place, without the additional penalty of being obliged to go hundreds of miles away from home and business

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for the convenience of the person who wants the examination for his own purposes and his own benefit only.

That ordinarily the place of residence of the person examined is the proper place for his examination seems to me to be manifest: and it is more than once or twice emphasised in the Rules: for instances, Rule 227 provides for the cross-examination of a person who has made an affidavit, "in the county in which the witness resides;" and Rule 228 provides that an examination of a witness for the purpose of using his evidence on a motion is to be taken "in the county in which the witness resides." Then, for the purposes of discovery, Rule 337 provides that the party to be examined shall attend before the proper officer "in the county in which he resides:" and the "General Rules as to Examinations" provide, first, in Rule 345, for the examination of "any party who is liable to be examined," "in the county in which he resides:" but under Rule 347 an order may be made for the examination "in any other county;" that is, when any special circumstances require, or warrant, it, the ordinary rule may be departed from: but, without special circumstances, an application under Rule 347 should not be entertained. And, yet another instance, Rule 580 provides for the examination of a judgment debtor "before the proper officer of the county in which he resides."

No special circumstances are suggested in this case; no sort of reason is given for putting this plaintiff to the inconvenience and loss which the order in appeal would subject him to, without any substantial benefit to the defendants.

If there were any substantial reason why an examination in Toronto would be better than an examination in New York, then it would be proper to consider on what terms as to witness-fees, witness's convenience, etc., the order bringing this plaintiff here should be made: but no such case is made: the case which is made is one of the every-day character of "a step in the action examination" for general purposes.

The appeal is allowed: the order must be amended so as to provide for the examination taking place in New York; costs of this appeal to the plaintiffs in the action in any event.

[IN CHAMBERS.]

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March 23.

RE IDEAL FOUNDRY AND HARDWARE CO.

Company—Winding-up—Custody of Goods in Possession of Sheriff under Execution against Goods of Company—Claims of Alleged Purchaser—Right of Liquidator—Winding-up Act, R.S.C. 1906, ch. 144, secs. 33, 84, 133.

At the time when an order was made, under the Winding-up Act, R.S.C. 1906, ch. 144, for the winding-up of a company, certain goods, which were admittedly at one time the property of the company, were in the custody of the sheriff, in the building occupied by the company and in which its business had been carried on, under a writ of *fi. fa.* against the goods and lands of the company. The goods were claimed by the appellants, two men who asserted that they had bought the goods from the company:—

Held, that the winding-up order superseded the execution, and that the liquidator should have the custody of the goods, pending an inquiry into the validity of the appellants' claims, and without impairing those claims.

Sections 33, 84, and 133 of the Act referred to.

APPEALS by one Arnold and one Winterjoiner, claimants, from an order of J. A. C. Cameron, Esquire, an Official Referee, who had been appointed Referee by an order for the winding-up of the company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144.

The order appealed against was made by the Referee for the purpose of the interim preservation of the chattel property of the company, directing that it should be placed in the custody of the liquidator pending an inquiry into the validity of the claims of the appellants, who alleged that they had bought the property.

March 15. The appeals were heard by MEREDITH, C.J.C.P., in Chambers.

A. C. Heighington, for Arnold.

A. E. Knox, for Winterjoiner.

M. L. Gordon, for the liquidator.

March 23. MEREDITH, C.J.C.P.—The substantial question involved in these appeals is: whether the appellants, or the liquidator of the company which is the subject of these winding-up proceedings, should have possession of the goods in question, which goods were admittedly at one time the property of the company, and, at the time when the winding-up order in this matter was made, were in the custody of the sheriff, in the building which had been in the occupation of the company and in which its business had

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been carried on, under a writ of execution against the goods and lands of the company.

And the answer to that question seems, plainly, to me, to be: the liquidator:

He is, upon his appointment, to take into his custody, or under his control, all property to which the company is, or appears to be, entitled: the Winding-up Act, sec. 33.

No lien or privilege exists by reason of the sheriff's levy under execution, except, in certain circumstances, for costs: *ib.*, sec. 84.

And all remedies for enforcing any claim for, among other things, a right of property in any effects or property in the custody of the liquidator are to be obtained in the winding-up proceedings: *ib.*, sec. 133; see also *Re J. McCarthy & Sons Co. of Prescott Limited* (1916), 38 O.L.R. 2, 32 D.L.R. 441.

When the winding-up order was made, the goods were in the custody of the sheriff, as the goods of the company; and the winding-up order superseded the execution: so that the possession of them should have passed, as it in fact did, from the one officer of the law to the other: but without in any way impairing any claims which the appellants could have made, and can make, respecting them.

Upon an application, for that purpose, it can, speedily, be settled in what manner the several conflicting claims in respect of the goods shall be tried and determined; meanwhile they are in safe custody: see *In re Plas-Yn-Mhowys Coal Co.* (1867), L.R. 4 Eq. 689; *In re Hille India Rubber Co. (No. 2)*, [1897] W.N. 20; and Palmer's Company Precedents, vol. 2, pp. 408 *et seq.*

These appeals are dismissed with costs, to be paid to the liquidator, in any event, when the appellants' claims to the goods are finally disposed of, or abandoned, if abandoned.

[IN CHAMBERS.]

1918

March 23.

RE CITY OF TORONTO AND TORONTO R.W. Co.

Costs—Taxation—Motion to Stay Execution upon an Order not Made in an Action—Interlocutory or Originating Motion—"Analogy thereto"—Rule 2.

A motion to stay execution upon an order of the Dominion Board of Railway Commissioners, made a rule of the Supreme Court of Ontario, while neither an interlocutory motion in an action nor an ordinary motion upon originating notice, has such analogy (Rule 2) to the latter as to justify the taxation of the costs of it according to the provisions of the Tariff of Fees applicable to motions upon originating notices.

APPEAL by the Toronto Railway Company from a ruling of the Senior Taxing Officer that the costs of the Corporation of the City of Toronto of a motion made by the appellants in Chambers (see *Re City of Toronto and Toronto R. W. Co.* (1918), ante 82), which was dismissed with costs, should be taxed as costs of an originating notice, and not as of an interlocutory motion.*

The motion referred to was for an order staying the execution of a writ of *fi.fa.* issued by the Corporation of the City of Toronto upon an order of the Dominion Board of Railway Commissioners, made a rule of the Supreme Court of Ontario, pending the determination of the right of the corporation to receive payment of the money for the levying of which the writ was issued, and for an order directing the trial of an issue to determine such right.

* Rule 10.—(1) Every proceeding in the Court, other than an action or a proceeding that may be taken *ex parte*, shall, unless otherwise specially provided, be commenced by a notice of motion called an originating notice.

(2) When by any statute an application may be made to the Court or a Judge in a manner therein provided, such application may also be made by originating notice, but any security required by such statute shall be given.

In the "Tariff of Fees to be Allowed Solicitors in the Supreme Court," appended to the Rules (Tariff "A."), the following items are found:—

9. Upon contested interlocutory Chambers motions	\$20.00
Subject to increase in the discretion of the Taxing Officer to a sum not exceeding \$30.00.	
17. On originating motion in Court, to the party moving, to cover all preliminary proceedings, notices, affidavits, services, etc...	20.00
Subject to increase to \$40.00.	
In Chambers	15.00
Subject to increase to \$30.00.	
To a party appearing for preliminary proceedings	10.00
Subject to increase when affidavits necessary to \$30.00.	
In Chambers to \$25.00.	
Counsel fee in the discretion of the Taxing Officer at Toronto.	

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March 8. The appeal was heard by MIDDLETON, J., in Chambers.

D. L. McCarthy, K.C., for the Toronto Railway Company.

C. M. Colquhoun, for the Corporation of the City of Toronto.

March 23. MIDDLETON, J.:—Appeal from taxation. The sole question is whether the costs of the motion herein should be taxed as of an originating notice or as of an interlocutory motion. The Taxing Officer has ruled in favour of the former.

I have come to the conclusion that this is right.

When an action has been brought, then all applications in that action are interlocutory, within the meaning of the Rules, unless the application determines the merits of the action, e.g., a motion for judgment, or an appeal from a determination upon a motion for judgment or a hearing.

Where a matter is not brought into Court by a writ, then it is instituted by an originating notice; and, when the merits of that motion are dealt with, a more liberal provision is made for costs than on a mere interlocutory motion, because the summary hearing is the determination of the controversy.

Here the motion was not an interlocutory motion in an action, and it may be was not an ordinary originating notice; it was an attempt to purge the records of the Court from what was regarded as an interloping judgment which had been placed upon the record without sufficient warrant, as it was thought.

While difficult and probably impossible to classify, this motion, having regard to the provisions of Rule 2*, while it may not have been strictly an originating motion, has such "analogy thereto" as to justify the taxation.

The appeal will be dismissed with \$10 costs, for *this* motion is interlocutory.

* Rule 2. All rules and orders heretofore passed are rescinded, except those mentioned in the schedule hereto, and as to all matters not provided for in these Rules, the practice shall be regulated by analogy thereto.

[APPELLATE DIVISION.]

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GOUGH V. TORONTO AND YORK RADIAL R.W. Co.

March 23.

April 23.

Costs—Taxation—Action Brought by Insurer in Name of Assured—Nominal Plaintiff not Responsible for Costs to Solicitor—Right to Tax Costs against Opponent—Subrogation—Order of Judge in Chambers on Appeal from Ruling of Taxing Officer—Right of Appeal to Divisional Court.

The plaintiff's automobile was injured by the negligence of the defendants' employees. The plaintiff was insured against injury by such an accident as that which occurred, and the insurance company adjusted and paid his loss. This action was brought by the insurance company, in the name of the plaintiff, to recover damages for the loss sustained, and in the action there was judgment for the plaintiff for \$600 and costs:—

Held, by MIDDLETON, J., in Chambers, upon appeal from a ruling of the Senior Taxing Officer, that the insurance company, being called upon by the plaintiff to indemnify him, was by law subrogated to his rights against the wrongdoer; this was not an assignment of the right of action, for it was founded on tort and could not be assigned; it was the right of the insurer to resort to the Court and to assert, in the name of the assured, the assured's right of action against the wrongdoer; when the judgment was recovered, though in the name of the assured, it was the property of the insurer; the costs awarded were in the same way the costs of the insurer, though awarded in the name of the assured; and the rule that a party cannot tax against his opponent solicitor's fees which he is not called upon to pay, had no application.

Walker v. Gurney-Tilden Co. (1899), 19 P.R. 12, and *James Nelson & Sons Limited v. Nelson Line (Liverpool) Limited*, [1906] 2 K.B. 217, explained and distinguished.

Seemle, where the insurer sues in the name of the assured, he is a nominal plaintiff, and in proper cases security for costs may be ordered; also the insurer is a person for whose benefit the action is brought, and from whom discovery may be had.

An appeal by the defendants from the decision of MIDDLETON, J., was dismissed by a Divisional Court of the Appellate Division.

No opinion was expressed as to whether there was a right of appeal without leave.

APPEAL by the plaintiff from a ruling of the Senior Taxing Officer that the plaintiff was not entitled to tax any costs of the action, though he recovered judgment therein against the defendants with costs.

March 8. The appeal was heard by MIDDLETON, J., in Chambers.

J. P. Walsh, for the plaintiff.

W. Lawr, for the defendants.

March 23. MIDDLETON, J.:—Appeal from the decision of the Taxing Officer at Toronto refusing to tax to the plaintiff any costs of the action.

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The plaintiff's automobile was injured by the negligence of the defendants' employees, and the action was brought, and there was judgment for the plaintiff for \$600 and costs.

Before the Taxing Officer it was shewn that the plaintiff was insured in the Travelers' Indemnity Company against injury by such an accident as that which occurred, and that the insurance company had adjusted and paid his loss, and that the action was brought by the insurance company in the plaintiff's name.

The Taxing Officer has refused to allow costs because the litigation was the litigation of the insurance company and not of the plaintiff, the action being carried on at the risk and expense of the company and not of the plaintiff.

This is supposed to be the result of the decision in *Walker v. Gurney-Tilden Co.* (1899), 19 P.R. 12.

I cannot agree with this reasoning. Many cases have decided that costs are an indemnity, and an indemnity only, and *Walker v. Gurney-Tilden Co.* is only an application of this general principle. When a solicitor undertakes to act without reward, the client cannot tax, against his opponent, solicitor's fees which is he not called upon to pay. When a solicitor agrees to accept a salary (save when the rights have been modified by statute), costs cannot be taxed because the client is not called upon to pay the solicitor any greater sums by reason of the particular action. So, when a client insured himself against the risk of law-suits, he could get no costs because this was covered by the premium he had agreed to pay—law-suit or no law-suit.

But that has no application to the matter in hand. A wrong is committed by the defendants, and they must answer for the damage done. The owner of the thing destroyed has a right of action to recover this damage, and has also a contract of indemnity. This insurance is for the benefit of the owner, not for the advantage of the wrongdoer, and the wrongdoer cannot set up the insurance as an answer to the claim. When the owner in the first place chooses to call upon the insurance company to indemnify him, then the insurance company is by law subrogated to his rights against the wrongdoer. This is not an assignment of the right of action, for it is founded in tort and cannot be assigned; but it is the right of the insurer to resort to the Courts and to assert, in the name of the insured, his right of action against the wrongdoer.

When the judgment is recovered, though in the name of the insured, it is the property of the insurer.

The costs awarded are in the same way the costs of the insurance company, though awarded in the name of the insured. It is not in any sense a similar question to that raised in the cases relied on.

When at common law an action was brought by the assignee of a chose in action in the name of the assignor, it was never thought that, when costs were awarded, none need be paid because the solicitor suing was retained by the assignee and not by the assignor.

What Mr. Lawr mainly argued was, that the insurance company should be compelled to sue in its own name or as a co-plaintiff. When an action is being brought or defended in the name of an insurance company, it is thought that in the eyes of the jury this prejudices the case, and so it has been held to be most improper to refer to that fact either in evidence or argument—for this has nothing to do with the issues presented for trial. What is desired is to compel the insurance company to disclose on the face of the record the fact that it is suing. Apart from the fact that the right to sue in the name of the assured is clear when there is subrogation, and from the fact that in cases of tort this is the only way in which an action can be brought, this is an attempt to accomplish an undesirable object in an indirect way. It may be that the defendants are themselves insured, and it would be just as fair to compel them to disclose this fact.

Where the insurance company sues in the name of the assured, no doubt he is a nominal plaintiff, and in proper cases security for costs may be ordered; and also the insurance company is a person for whose benefit the action is brought, and so discovery may be had against it.

In the case cited by Mr. Lawr of *James Nelson & Sons Limited v. Nelson Line (Liverpool) Limited*, [1906] 2 K.B. 217, the whole point of the argument and decision was that, because the insurers had not paid all the loss, but only three-quarters of the loss, there was not a case of subrogation, nor were the plaintiffs nominal plaintiffs, as they had a beneficial interest to the extent of one-quarter of the whole, and would hold the remaining three-quarters for the insurance company.

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The appeal should be allowed, and it should be referred to the Taxing Officer to tax the costs on the basis of the insurance company being the real litigants, and the plaintiff's name being a name the law authorised them to use to sue. The costs of this motion will be added.

The defendants appealed from the order of MIDDLETON, J.

April 22 and 23. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

J. H. Moss, K.C. (with him *W. Lawr*), for the appellants, argued that this was not a case of subrogation. Gough was indemnified against all costs by the insurance company, and had been settled with before action. Therefore the insurance company, in bringing an action and getting costs, were subrogated to a right which never existed in Gough. Gough was not liable to pay any costs to his solicitor, and so these costs should not be recovered against the defendant: *Walker v. Gurney-Tilden Co.*, 19 P.R. 12; Halsbury's Laws of England, vol. 17, pp. 490, 492, 518, 519. Party and party costs are awarded as an indemnity only: *Gundry v. Sainsbury*, [1910] 1 K.B. 645; *Simpson v. Local Board of Health of Belleville* (1917), 41 O.L.R. 320.

THE COURT questioned the right of the defendants to appeal without leave.

Moss contended that leave to appeal was not necessary: the question was one of principle, not one of discretion. He referred to Rules 507, 508, and 509.

J. M. Ferguson, for the respondent, was not called upon.

MACLAREN, J.A., said that the Court was of opinion that no case had been made out by the appellants.

A question as to the right of appeal was raised, but the Court expressed no opinion upon that, and established no precedent as to the allowance of appeals of this nature.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

ROGERS v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
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ROGERS v. MERCANTILE FIRE INSURANCE CO.

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Insurance (Fire)—Policies on Stocks of Goods in Different Buildings—Insurance Act, R.S.O. 1914, ch. 183, sec. 194, condition 5—Construction—"Effect other Insurance thereon"—Consolidation of Stocks in one Building—Removal of Goods so that they Become Covered by Policy of another Company—Assent of Insurers—Authority of Agent—Knowledge of Insurers.

The plaintiff, a merchant carrying on business in the town of S., in July, 1914, effected an insurance in the G. company on a stock of merchandise in a building in B. street and an insurance in the M. company on another stock in a building in E. street. K., an agent for both companies, received the applications and issued the policies, which he had authority to do. In November, 1915, the plaintiff moved both stocks to a building in D. street, where they were consolidated into one stock; and K. endorsed upon each policy a declaration that the property insured should in future be held insured in the D. street building, and not elsewhere. The policies were renewed in 1916, and were in force in January, 1917, when the property insured was damaged by fire in the D. street building; and these actions were brought against the G. company and the M. company to recover the amount of the loss.

Both policies were subject to statutory condition 5: "If the assured now has any other insurance on any property covered by this policy which is not disclosed to the company or hereafter effects any other insurance thereon without the written assent of the company, he shall not be entitled to recover in excess of 60 per cent. of the loss or damage in respect of such property," etc. The defendants contended that to remove the goods covered by the policy of one company so that they became covered also by the policy of the other company was to "effect . . . other insurance thereon," and that they were liable only for 60 per cent. of the loss:—

Held, that the defendants could not succeed upon this contention.

Per MULOCK, C.J.Ex.:—Assuming that the consolidation of the two stocks effected additional insurance, the defendants had given their written assent thereto within the meaning of the statutory condition.

Per RIDDELL, J.:—The words of the statutory condition, "effects any other insurance thereon," mean to bring about or procure other insurance non-existent at the time of the original policy, and "thereafter" in reference to "now." The meaning should not be stretched to cover what may have been intended.

Per SUTHERLAND, J.:—The words should be construed so as to give them their natural meaning, if there was nothing—and there did not appear to be anything—to modify or alter or qualify the language used. What was done in connection with the policies could not be construed to mean the effecting of another insurance.

Per RIDDELL and SUTHERLAND, JJ.:—Discussion of the case of *Harris v. London and Lancashire Fire Insurance Co.* (1866), 10 L.C. Jur. 268, and certain American cases, which were not followed.

Per KELLY, J.:—Whether or not the consolidation operated so as to "effect" other insurance on the goods or any of them was not, in the circumstances, the sole element determining the liability. The agent, possessing extensive powers, was cognizant of the whole situation, and the knowledge he had must be taken to be the knowledge of his principals as well. Unless relieved therefrom because of the lack of written notice of a matter of which he was then well-informed, his duty was to acquaint his principals with the situation; his failure to do so should not operate to the prejudice of the plaintiff,

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or relieve the defendants in respect of a matter of which they were, through their recognised representative, fully aware. The defendants, having full knowledge of the circumstances, continued the insurance until the fire occurred, making no objection in the meantime; and were not entitled to succeed upon the contention now made.
Judgment of CLUTE, J., affirmed.

ACTIONS by A. J. Rogers upon two policies of fire insurance covering goods and merchandise upon his premises in the town of Sudbury, destroyed or injured by a fire which occurred on the 17th January, 1917.

November 6 and 7, 1917. The actions were tried together by CLUTE, J., without a jury, at a Toronto sittings.

A. J. Russell Snow, K.C., and *McFadden*, for plaintiff.

A. C. McMaster and *J. H. Fraser*, for the defendants.

November 17, 1917. CLUTE, J.:—The actions were tried together, the evidence being largely applicable to both.

These actions are in respect of loss alleged by the plaintiff to have been sustained in a fire which occurred at Sudbury on the 17th January, 1917.

The plaintiff was insured in the General Accident Fire and Life Assurance Corporation Limited, hereinafter called the "General," on the 21st July, 1914, for \$1,000 on "merchandise consisting largely of china, glassware, crockery, musical instruments, stationery, and smallware, and \$800 on store furniture and fixtures, useful and ornamental, including safe, cash-register, signs, awnings, tools, implements, scales, all contained in and upon the described building known as No. 33 on the west side of Elgin street in the town of Sudbury." Endorsed upon the policy and dated the 15th November, 1915, is a declaration, signed by the authorised agent of the insured, that the property insured under the policy having been removed to a store No. 628 on the west side of Durham street, in Sudbury, known as "Rogers' Fair," it is hereby declared that such property shall in future be held insured in the said store and not elsewhere, and \$15.20 premium was returned.

It is stated in the body of the policy that there is a further insurance of \$2,000 in the "Palatine."

The plaintiff also had insurance in the Mercantile Fire Insurance Company, herein called the "Mercantile," for \$1,000 on

merchandise consisting chiefly of china, glassware, crockery, musical instruments, stationery, and smallware, situated in a store-house in the rear of the south side of Beach street in the town of Sudbury, and it is stated that there is a further insurance of \$1,000 in the "Palatine." There is also an endorsement authorising removal, signed by the authorised agent, dated the 13th November, 1915, of the goods insured, to the same building as the other removal provided for, on Durham street, known as "Rogers' Fair."

Both these policies were issued by Thomas N. Kilpatrick, the agent of the defendant companies at Sudbury, who had authority to issue the same in the first instance, the companies reserving the right to cancel them at any time, upon giving notice.

The policies were taken, after personal inspection by the agent, without formal application, he representing some ten companies, and he was authorised to place the risks as he thought proper; he also had authority to authorise removal.

The policies were in full force at the time of the fire. The plaintiff claims the amount ascertained by the adjuster representing all companies interested in the loss, including the defendants.

The plaintiff claims from the "General" \$1,560.47, with interest at 5 per cent. from the 25th March, 1917, and from the "Mercantile" \$855.47, with interest from the 25th March, 1917, the day the adjustment was made.

The defence offered was mainly as to the insufficiency of proofs and fraud, and that the proofs are false and fraudulent under the terms of the Insurance Act, and that there was overvaluation in claiming for total loss when in fact there was considerable salvage, and that there was not such sufficient proof of the account of the loss as the nature of the case permitted.

I was well satisfied with the truthfulness of the plaintiff, and that he was not intentionally guilty of any fraud or misdealing in respect of the fire or the loss or proofs of loss or furnishing an account as required by the statute.

It was urged as a further defence that the effect of the removal of the goods, which were in two separate buildings on different streets at the time the insurance was made, and were afterwards removed to one building, had the effect of creating what was called a "second insurance" on goods in the same building, without notice. It did not appear to me that this view was open to argument: the

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insurance having been placed properly upon the goods in separate buildings, the authorised removal afterwards to the one building could not make void a policy which was valid at the time the insurance was taken. There was in fact no further insurance.

It was further urged that in the proofs there was a false statement, because it was there declared that there was a total loss; whereas, in the ascertaining of the loss by the companies' adjuster and the plaintiff, the large amount of \$2,400 was deducted for salvage.

What took place in that respect was this. The companies' appraiser arrived on the morning of the 20th January, and gave forms of proof to the plaintiff, who took them to his solicitor, and they both went to examine the goods destroyed or injured by the fire, which, according to the evidence of the plaintiff and the solicitor, they considered to be a total loss. The main floor had fallen in, and the basement had been flooded with water until it stood, it was stated, over two feet in the cellar.

The fire marshal was at the same time proceeding with an investigation as to the cause of the fire. The defendants' appraiser was waiting for the plaintiff's proofs to ascertain the loss, and no extended or thorough examination of the loss was made or could be made within the time at the plaintiff's disposal, the proofs having been handed back to the adjuster on the 22nd January.

As soon as the proofs were handed back, Mr. Grant, the adjuster, and the plaintiff proceeded, as he states, to arrive at a settlement, which appears as exhibit 12, where the salvage on the stock is said to be \$1,710.92 and on the fixtures \$721.15. These were the amounts allowed, although on an actual sale, after a great deal of expense and work had been applied in getting the stuff ready for sale, the stock only realised about \$200 after all costs had been paid, and the fixtures between \$300 and \$400.

I was satisfied that the salvage deducted from the plaintiff's claim was grossly overvalued in the adjustment: \$200 was mentioned in the proofs as salvage of the fixtures, which was much nearer to the fact than the amount allowed by the adjuster.

Some evidence was given with the view of casting suspicion as to the cause of the fire, but this was not pressed; the only suspicion raised, so far as I could see, was by reason of the fact that the plaintiff was in the building late on the night of the fire, and was

the last one to leave the building. This, however, was satisfactorily explained, I think, by the fact that the plaintiff and a bank-clerk were working in the store making up the books, which had got behind by reason of the absence of the bookkeeper.

The plaintiff had, previous to the fire, difficulty in meeting his payments, and had asked an extension of time, which was granted to him upon payment of the full indebtedness, with interest at 6 per cent., extending over a period of time. He was a young man without much experience in business, and had at the time he commenced business in Sudbury a one-third interest in a \$22,000 mortgage. He had raised and put into the business by this mortgage the sum of \$3,500, but made no attempt to get rid of his estate or anything of that kind. He transferred the balance of his interest in this mortgage, and also interest under the insurance, to his creditors, and there is sufficient of the estate, if the insurance is paid, to pay the creditors in full.

It was said by the adjuster that the plaintiff gave every assistance in his power to ascertain the amount of the loss and incident to the adjustment.

There was evidence that goods more than sufficient to replace the goods insured were subsequently bought.

Reliance was placed upon clause 5 of the statutory conditions, and it was urged that in any event not more than 60 per cent. of the loss should be allowed, having regard to the location of the goods at the time the insurance was made and the manner in which the insurance was effected.

Statutory condition 5 provides that: "If the assured now has any other insurance on any property covered by this policy which is not disclosed to the company or hereafter effects any other insurance thereon without the written assent of the company, he shall not be entitled to recover in excess of 60 per cent. of the loss or damage in respect of such property . . ."

The agent who had been authorised to issue the policy having inspected the goods then situated on different premises, and having regard to the fact that the removal was by the authority of the defendants, I do not think this clause has any application to the present case; and it is also clear, I think, that the latter portion of the clause, which provides that "if for any fraudulent purpose the assured does not disclose such other insurance to the company

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this policy shall be void," has also no application. There was no other insurance except that which was mentioned at the time the policy was taken, and there clearly was no fraud.

I am also of opinion that what was done in regard to the adjustment, and the fact that no further proofs of loss were called for, amounted to a waiver of all objections to the proofs of loss: see *Adams v. Glen Falls Insurance Co.* (1916), 37 O.L.R. 1, 31 D.L.R. 166; see also *Mutchmor v. Waterloo Mutual Fire Insurance Co.* (1902), 4 O.L.R. 606, where it was held that to a subsequent insurance for \$4,000 in another company, for a prior insurance to that amount in one of the two companies mentioned in the application, the assent of the defendants was not necessary.

In the present case the position of the defendants' agent was rather unique. He had knowledge of the whole position of matters prior to the fire and what insurance there was on the property, and, according to his evidence, was well satisfied with the *bona fides* of the plaintiff in effecting all the insurances upon the property.

I think the plaintiff should have judgments against the defendants for the amounts claimed with costs.

The defendants appealed from the judgments entered against them respectively.

January 28. The appeals were heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and KELLY, JJ.

A. C. McMaster, for the appellants, argued that to remove the goods covered by the policy of one company so that they became covered by the policy of another company was to effect other insurance on the goods, and thus prevent the recovery of more than 60 per cent. of the loss, under condition 5, sec. 194 of the Ontario Insurance Act, R.S.O. 1914, ch. 183: *Harris v. London and Lancashire Fire Insurance Co.* (1866), 10 L.C. Jur. 268; *Walton v. Louisiana State Marine and Fire Insurance Co.* (1842), 2 Rob. (Supreme Court of Louisiana) 563; *Washington Insurance Co. v. Hayes* (1867), 17 Ohio St. 432; *Peoria Marine and Fire Insurance Co. v. Anapow* (1867), 45 Ill. 86. Counsel also referred to the fact that the concurrent insurance in the Palatine company was put down in one of the policies as \$2,000 and in the other as \$1,000.

A. J. Russell Snow, K.C., for the plaintiff, respondent, contended

that the condition referred to had no application to the present case. Kilpatrick, the agent of all the companies, had assented to the removal and consolidation, with full knowledge of the facts. If he did not notify his principals, the plaintiff should not suffer for his neglect. The consolidation was not an effecting of other insurance within the meaning of the section: *Vose v. Hamilton Insurance Co. in Salem* (1862), 39 Barb. (N.Y.) 302.

McMaster, in reply.

March 25. MULOCK, C.J.Ex.:—These are appeals from judgments of Clute, J., in two separate actions tried together. In each case the defendant company contends that the plaintiff's judgment should be reduced by the sum of \$342.19. Such is the sole question involved in each appeal, and it arises as follows. The plaintiff, a merchant carrying on business in the town of Sudbury, effected fire insurance for \$1,000 in the General Accident (etc.) Assurance Corporation, on a stock of merchandise contained in a building situate in the rear of the south side of Beach street in the town of Sudbury, and also effected fire insurance for another \$1,000 in the Mercantile Fire Insurance Company on another stock of merchandise contained in a certain other building, being No. 33 on the south side of Elgin street. Mr. T. N. Kilpatrick was the agent in each case to receive the application and premium and to issue the policy. He had extensive powers. The companies entrusted to him policies executed in blank. He had authority to receive applications and premiums for insurance, to fill up and deliver policies, to assent to changes in insurance contracts—in fact, to do whatever the companies might do in connection with their insurance business, subject to the one qualification, that the companies might cancel any contracts made by him, but which until cancelled were to remain in full force. Each company knew of Kilpatrick's relations with the other.

On the plaintiff's application for insurance, Mr. Kilpatrick examined the stock and issued to the plaintiff the two policies in question. The two stocks were of the same kinds of merchandise, and are described by the same language in each policy. On or before the 13th November, 1915, the plaintiff moved both stocks to store No. 628 on the west side of Durham street, where they were consolidated into one stock, and he applied to Mr. Kilpatrick,

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the representative of both companies, to continue the insurance. Thereupon Mr. Kilpatrick made the following endorsements on the policies:—

“The property insured under this policy having been removed to the store etc. No. 628 on the west side of Durham street, town of Sudbury, it is hereby declared that such property shall in future be held insured in the said store and not elsewhere” etc. “Dated November 13th, 1915. T. N. Kilpatrick, Agent.”

The endorsement on the “Mercantile” policy also contained the following words after the words “not elsewhere:” “Subject nevertheless to all the conditions and stipulations therein contained.” Each policy is subject to the statutory condition No. 5, which reads as follows:—

“If the assured now has any other insurance on any property covered by this policy which is not disclosed to the company or hereafter effects any other insurance thereon without the written assent of the company, he shall not be entitled to recover in excess of 60 per cent. of the loss or damage in respect of such property,” etc.

The defendants contend that the consolidation of the two stocks into one stock effected additional insurance, and that they are therefore liable only to the extent of 60 per cent. of the loss. This was the only ground of appeal urged before us. For the purposes of the defendants’ argument, I will assume that the consolidation of the two stocks effected additional insurance.

The question is, have the defendant companies given their written assent to the consolidation? With knowledge of the facts, Kilpatrick, their agent, gave his written assent over his hand to the continuance of the insurance containing the statement above quoted, that “such property shall in future be held insured in the said store and not elsewhere.” It thus seems to me that each company, through Kilpatrick, gave its written assent to the continuance of the insurance under the altered conditions. According to its language, each policy is an insurance on goods in the event of loss to the extent of \$1,000, but now the defendants say that the assents given are to be construed as cutting down each policy from being an insurance contract to make good the loss to the extent of \$1,000 to one for only 60 per cent. of the loss.

If the consolidation of the two stocks had the legal effect

contended for by the defendants, Kilpatrick, and through him his principals, must be assumed to have known such legal effect. And when, with such knowledge, Kilpatrick, over his own hand, declares that the property insured under each policy shall be held insured in the new premises, I think the only interpretation to place upon the assent is, that each policy was to continue in force and constitute an insurance to the full extent of the loss, but not exceeding \$1,000, on the consolidated stock. That the companies so interpreted it is manifest by what occurred when the policies were about to expire. That in the General Accident (etc.) company was, on the 21st July, 1916, renewed for one year. That policy covered \$1,000 insurance on merchandise and \$800 on fixtures; and the premium then paid was, as regards the merchandise, the amount payable for insurance to the extent of \$1,000; and the receipt given over the hand of Kilpatrick, the agent, and of Thomas H. Hall, the company's manager for Canada, declares that the amount insured was \$1,800, that is, \$1,000 on merchandise and \$800 on fixtures.

On the 14th September, 1916, the policy in the Mercantile company was renewed for one year, and the premium paid for that renewal was for an insurance to the extent of \$1,000, and the company in their receipt for that premium, over the hand of Kilpatrick and the hand of Alfred Wright, their secretary, states that the sum insured was \$1,000.

Each of the renewal receipts constituted a new contract, the terms of which must be determined by reference to the terms contained in the original policy, but subject to the qualification that the renewal contract is applicable to changes happening since the original contract and of which the company had notice. When those renewal receipts were issued for the amounts of insurance stated in them, the companies were each aware of the removal of the two stocks and of their consolidation, and the new contracts had reference to the new conditions and should be so construed.

For these reasons, I would dismiss these appeals with costs.

RIDDELL, J.:—This is an appeal in two cases (argued together) by the defendants, insurance companies, against the judgment of Clute, J., at the trial.

In the view I take of the cases, it is unnecessary to consider

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minutely the particular facts—my judgment turns wholly on the law.

By statutory condition No. 5—in sec. 194 of the Ontario Insurance Act, R.S.O. 1914, ch. 183—it is provided that:—

“If the assured now has any other insurance on any property covered by this policy which is not disclosed to the company or hereafter effects any other insurance thereon without the written assent of the company, he shall not be entitled to recover in excess of 60 per cent. of the loss . . .”.

It is argued that the removal of the goods covered by the policy of one company so that they became covered also by the policy of the other company is to “effect . . . other insurance thereon,” so as to prevent the recovery of more than 60 per cent. of the loss.

In my view, had the Legislature meant “or if the property covered by this policy hereafter be affected by other insurance,” it would have said so—the best way of finding out what the Legislature means is to find out the meaning of what it says. And it has said, “if the assured . . . hereafter” (i.e., after the coming in force of the original policy of insurance) “effects any other insurance thereon.” I think this means to bring about, procure, insurance non-existent at the time of the original policy, and “thereafter” in reference to its “now.”

There does not seem to be any decision in our Courts on the point.

In a trial Court in the Province of Quebec, Meredith, C.J., in directing the attention of the jury to the question, “At the time of the destruction of the property insured had the plaintiff effected any insurance or insurances on the same with any other insurance companies?” made certain statements which are much relied on by the appellants: *Harris v. London and Lancashire Fire Insurance Co.*, 10 L.C. Jur. 268, at pp. 273, 274. The plaintiff had a stock in a St. Peter street store insured in the London and Lancashire Fire Insurance Company, and one on Nôtre Dame street insured in the Liverpool and London Insurance Company. He removed his St. Peter street stock to Nôtre Dame street, in February, 1865—thereafter, in June, 1865, he renewed his policy on the Nôtre Dame street stock, and took out another policy, in the Quebec company. The Chief Justice considered that he thereby

had effected insurance in the London and Liverpool and the Quebec company. That has no bearing on the present cases—here there was no renewal and no new policy.

In *Walton v. Louisiana State Marine and Fire Insurance Co.*, 2 Rob. (Supreme Court of Louisiana) 563, the exact terms of the condition do not appear—all we are furnished with is “the usual clause requiring notice to the insurers, and an endorsement on the policy, of any other insurance elsewhere on the same stock.” This is not helpful.

In *Washington Insurance Co. v. Hayes*, 17 Ohio St. 432, the condition was: “if any other insurance has been or shall hereafter be made upon the said property not consented to in writing . . .” The Supreme Court of Ohio held that the merging of an insured stock with another stock elsewhere insured, so as to become covered by that other insurance, was fatal: and that this was “effecting other insurance.”

In *Peoria Marine and Fire Insurance Co. v. Anapow*, 45 Ill. 86, the condition was: “if the assured had already any other insurance on the same property, or shall thereafter effect any other . . .” —and, under circumstances like the present, the Supreme Court of Illinois held the defence made out.

In New York, in *Vose v. Hamilton Mutual Insurance Co. in Salem*, 39 Barb. 302, the clause was: “in case any other policy of insurance has been or shall be issued covering the whole or any part of the property insured by this company . . .” The Supreme Court of New York (3rd Judicial District) held that the merger of the insured stock so as to become covered by another insurance policy was not “a case of double insurance in violation of this article,” while recognising “the temptations to fraud held out by additional insurances, and of the necessity of their being known to insurance companies” (p. 304).

The wording in the New York case is not precisely the same as in our statute, while that of the cases in Ohio and Illinois is not distinguishable from ours. Consequently, if we were bound by American cases we should have to hold in favour of the companies. We are not so bound: and I prefer to give to the words of the Legislature their literal meaning, and not to stretch this meaning to cover what it is suggested may have been intended.

I would dismiss the appeals with costs.

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SUTHERLAND, J. (after stating the facts):—On the appeal to the Appellate Division, apart from a suggestion that the concurrent insurance in the Palatine company was stated in one of the policies at \$2,000 and in the other at \$1,000, and the possible effect of such a misstatement—which point was very feebly pressed upon the argument, no doubt having regard to the knowledge of the agent of each company by whom the policies were prepared—the defendants relied solely upon the statutory ground of attack upon the judgment, and, without quarrelling with the respective amounts claimed against them and allowed by the trial Judge, sought to reduce their liability to 60 per cent. thereof.

No English or Canadian authority was cited, apart from a Quebec case of *Harris v. London and Lancashire Fire Insurance Co.*, 10 L.C. Jur. 268, 273, 274. In that case Meredith, C.J., in addressing the jury, used this language (p. 273):—

“The third question is as follows: ‘At the time of the destruction of the property insured had the plaintiff effected any insurance or insurances on the same with any other insurance company or companies, and to what amount or amounts, and when?’ The pretension of the plaintiff is that the insurances which he effected with the other offices were upon separate and distinct stocks of goods from those insured by the defendants. This would be quite true, if we could consider the insurances in favour of the plaintiff with reference to the time when they were first granted; but, unfortunately for him, they must be viewed with reference to the time of the fire. With respect to this question, it is hardly necessary for me to tell you that the insurance granted to the plaintiff by the policy sued on, was not confined to the goods actually in his store when the policy was granted. No; the insurance was on the plaintiff’s stock-in-trade. It was perfectly understood by both parties that the plaintiff would sell off his goods as fast as he could with advantage, and then replace the goods sold with other goods of the same kind. And it is plain that any goods of the description mentioned in the policy, brought upon the premises therein mentioned, so as to form part of the plaintiff’s stock described in the policy, were at once covered by the insurance thereby granted. If this be true, then it follows that when the plaintiff in February, 1865, brought to his store in St. Peter street his ‘stock-in-trade as jeweller and clockmaker,’ which he previously

had in Nôtre Dame street, insured by a policy from the Liverpool and London office, the Nôtre Dame street stock, if I may so speak of it, became at once a part of the stock-in-trade insured by the defendants. And when, on the 6th June, 1865, the plaintiff renewed his policy on his Nôtre Dame street stock, which had become part of his stock-in-trade in his store in St. Peter street, it was then covered by two insurances; that is to say by the defendants' policy as the stock insured in St. Peter street, and by the Liverpool and London office under the renewal of the policy of the 6th June, 1863. Any difficulty as to this point is removed by the declaration in the Quebec policy: 'The sum of £1,000 is insured in the Lancashire, and that of £650 in the Liverpool.' Here we have proof of the existence of three insurances upon the same stock-in-trade at the same time. And as the policy granted by the defendants bears date in 1864, whereas the Quebec policy bears date in 1865, it is only too clear that at the time of the destruction of the property insured, the plaintiff 'had effected insurance on the same' with two other companies, namely, the London and Liverpool and the Quebec."

The defendants relied to some extent upon this case, but it is apparent that it is very different from the one at bar, because there was, after the removal, a renewal of the policy on the Nôtre Dame street stock, and there was no such thing here. But I think I may say that the defendants mainly relied upon American authorities for the principle which it was argued on their behalf should be applied.

In one of these cases, namely, *Walton v. Louisiana State Marine and Fire Insurance Co.*, 2 Rob. (Supreme Court of Louisiana) 563, the facts were stated by Martin, J., as follows (pp. 563, 564):—

"The plaintiffs purchased the stock in trade of Lawrence, a grocer, in the stores Nos. 28 and 29 New Levée street, which was insured in the Louisiana State Marine and Fire Insurance Company. His policy extended to his stock and consignments held in trust, contained in the store. It was transferred to the plaintiffs with the assent of the company. At that time the plaintiffs had a grocery store, and a policy in the Merchants' office, and another in the Firemen's office, each for ten thousand dollars. The terms of these policies are literally the same as that of Lawrence. All these policies contained the usual clause that notice should be

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given to the company, and be endorsed on the policy, of all insurances made with other companies on the goods insured; and that unless such a notice be given, the insured shall not be entitled to recover. Soon after the purchase the plaintiffs removed all the goods in their store to Nos. 28 and 29 New Levée street, which now contained all the goods insured by them, and by Lawrence, their vendor."

The plaintiffs having omitted to notify the defendants of the two insurances previously existing on the stock, and it having been injured by fire, in an action against the defendants it was held, "that, by consenting to the transfer of the policy to the plaintiffs, defendants became the insurers of the stock-in-trade of the former in the store to which they removed, which stock consisted of the goods originally covered by their policy, and of plaintiffs' stock in their former store; that the latter were bound to give defendants notice of the two insurances previously existing on their stock; and that, having failed to do so, they cannot recover" (head-note).

In *Washington Insurance Co. v. Hayes*, 17 Ohio St. 432, the policy contained this provision: "And provided further, that if any other insurance has been or shall hereafter be made upon the said property not consented to in writing herein, or if the said property shall be sold and conveyed . . . in every such case, this policy shall be null and void;" and it was held therein, "that if the property so insured was, at the time the policy was made, under a mortgage, and the policy, with the assent of the company making the same, was assigned to the mortgagee, the delivery of the possession and control of the property to the mortgagee subsequent to the date of the policy, is not such a sale as will invalidate the policy" (head-note).

Vose v. Hamilton Mutual Insurance Co. in Salem, 39 Barb. (N.Y.) 302, was cited on behalf of the plaintiff. In this case the facts were as follows:—

"On the 1st of May, 1852, the defendant insured the plaintiffs' stock-in-trade in a store No. 146 River street, Troy, for \$2,500 for three years. The 18th article of the policy provided that 'in case any other policy of insurance has been or shall be issued covering the whole or any portion of the property insured by this company,' the policy issued by the defendant should be void, unless the company had notice thereof and gave a written consent thereto. On

the 9th of August, 1854, the goods were, with the consent of the defendant, removed to an adjoining store, in the same building, known as No. 148. At that time the insured had a stock of goods of the same description, in No. 148, which had been insured for \$2,500 by another company, January 12, 1852, for five years. The defendant gave no consent to such prior insurance, and had no knowledge of it." It was held "that this was not a case of double insurance, in violation of the 18th article of the policy" (head-note).

In the first of these American cases, the language of the clause in the policy which was in question is not given, the statement being merely that the policy contained the usual clause, and we cannot therefore get much assistance from it; in the second, the language in the policy is somewhat similar to that contained in the policies in question; and in the *Vose* case the language is not identical. We are, of course, not bound to follow any of these cases.

What we are called upon to do is so to construe the words that, if there is nothing, and there does not appear to be anything, to modify or alter or qualify the language used, the words be given their natural and ordinary meaning. Doing so, I am unable to see that what was done in connection with the policies in question can be construed to mean the "effecting" of another insurance.

I agree with the view expressed by the trial Judge, and would therefore dismiss the appeals, with costs.

KELLY, J. (after stating the facts and setting out parts of the testimony given by the agent Kilpatrick and the Canadian manager of the company, Hall, at the trial):—On cross-examination, Mr. Hall said that Kilpatrick was furnished with printed forms of consent to additional insurance, which he could sign if he chose, and the company would be bound.

Kilpatrick also says that each of the three companies (the two defendant companies and the Palatine company) was aware of his agency for the other companies.

Kilpatrick seems to have been fully aware of all that took place at the time of the removal. He was the person actively interested and engaged in the matter for the defendants; and not only had he full knowledge of the removal to which he gave his written consent, but he was also aware of the condition of the two stocks at the time

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of the removal and the manner of their treatment when they were brought into the Durham street store; for he expressly says that the plaintiff consolidated the two, and then he assented on behalf of the companies to the removals; but he does not seem to have advised his principals that the stocks had been consolidated.

In my opinion, the extensive powers possessed by this agent and the complete knowledge he had, not only of the removal of the two stocks, but, as he himself says, of their consolidation when they were removed, is of the highest importance in determining whether or not at this stage the defendants should be relieved from payment of the loss in excess of 60 per cent. Whether or not the consolidation operated so as to "effect" other insurance on the goods or any of them is not, in my judgment, under the present circumstances, the sole element determining the liability. The agent, possessing the very extensive powers which he did possess, was fully cognizant of the whole situation, and the knowledge he thus had must, it seems to me, be taken to be knowledge of his principals as well. Unless relieved therefrom because of the lack of written notice of a matter of which he was then well-informed, his duty was to have acquainted his principals with the situation; his failure to do so should not operate to the prejudice of the plaintiff, or relieve the defendants in respect of a matter of which they were, through their recognised representative, fully aware. His knowledge was acquired at the time of the removal, not casually, but in the course of his dealings for the defendants with the insurances. Having that knowledge, they continued the insurance until the fire occurred, making no objection in the meantime.

In my opinion, the circumstances are such that the appellants are not entitled to succeed. In stating this conclusion I do not in any way ignore or minimise the binding effect of the statutory condition referred to in a case where it applies; but the unusual facts on which the present cases rest distinguish them from cases wherein that condition is applicable.

Appeals dismissed with costs.

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Husband and Wife—Claim of Executors of Deceased Wife to Share of Money Received by Husband—Married Women's Property Act, R.S.O. 1914, ch. 149, secs. 4, 7 (1)—Business Carried on by Husband and Wife—Partnership—Sale of Business—Termination of Partnership—Instalment of Purchase-money Received by Husband—Liability to Account—Trustee—Constructive Trustee—Limitations Act, R.S.O. 1914, ch. 75, sec. 47(2)—Evidence—Money Lent by Wife—Interest Received by Husband—Future Instalment of Purchase-money—Declaration—Costs.

Since the Married Women's Property Act, 1884 (now R.S.O. 1914, ch. 149), a married woman has power to contract, even though she has no separate estate, so as to bind any separate estate she may subsequently acquire. She may now be a partner: sec. 4. She may contract with her husband as if she were a *feme sole*; and there may be a partnership between them. The words now found in sec. 7(1), "in which her husband has no proprietary interest," have the effect of enlarging the rights of a married woman.

Gibson v. Le Temps Publication Co. (1904), 8 O.L.R. 707, 708, approved.

It was *held*, in this case, upon the evidence, that the defendant and his wife were equal partners in an hotel business carried on by them; that the sale by them of the hotel, including the entire business and assets, was a sale of property in which the wife had an equal interest with her husband; and that he was liable to account to her for a portion of the purchase-money which he had received. The sale, while not formally dissolving the partnership, put an end to the business, and was in effect a termination of the partnership.

Crawshay v. Collins (1808), 15 Ves. 218, followed.

Held, however, in an action by the executors of the wife, who died after the sale, that their claim to an account of the purchase-money was barred, by virtue of the Limitations Act, after the lapse of six years from the receipt of the purchase-money.

The husband was not a trustee for the wife so as to preclude the application of the Limitations Act: there was no suggestion of fraud, and the case was not brought within the exception in sub-sec. (2) of sec. 47 of that Act (R.S.O. 1914, ch. 75).

Review of the authorities.

Noyes v. Crawley (1878), 10 Ch.D. 31, *Knox v. Gye* (1872), L.R. 5 H.L. 656, and *Gordon v. Holland* (1913), 82 L.J.P.C. 81, specially referred to.

The plaintiffs were debarred from recovering one-half of an instalment of the purchase-money received by the defendant (the husband); but were *held* entitled to recover for money lent by the wife to him and for a payment of interest which he received for her—\$537 in all—with County Court costs (without set-off) and costs of an appeal from the judgment of the trial Judge, which dismissed the action.

RIDDELL, J., dissenting in part, was of opinion that the husband was a constructive trustee for the wife of half of the proceeds of the sale of the business, and was entitled to set up the Limitations Act; that the wife could claim half of each payment of purchase-money as it was made; that the statute would begin to run in favour of the defendant only on the payment of an instalment and only as to that instalment; that, as to a part of the purchase-money not yet paid, there should be a declaration that the plaintiffs were entitled to half of it when paid; and that the plaintiffs should have costs of the action and appeal on the Supreme Court scale.

ACTION by the executrices and trustees under the will of Susan Roumegous, deceased, against the husband of the deceased,

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for a declaration that the deceased was the owner of an undivided half interest in certain property near Cooksville, purchased by the defendant, and in other property, and to recover money said to have been lent by the deceased to the defendant, and for other relief.

The action was tried at Brampton by BRITTON, J., without a jury.

D. L. McCarthy, K.C., and *T. L. Monahan*, for the plaintiffs.

H. J. Scott, K.C., and *T. R. Ferguson*, for the defendant.

December 8, 1917. BRITTON, J.:—This action is brought by the plaintiffs, executrices of their mother's will and trustees of her estate.

The mother of the plaintiffs was married to the defendant in 1877, in Fall River, Mass., and they came shortly after the marriage to Toronto.

Upon their arrival in Toronto, they had no money worth speaking about, and they at once engaged in the restaurant business. They were very capable people, the wife especially so; and the business they engaged in was prosperous almost continuously from the beginning to the end.

It is alleged that the defendant and his wife became the owners of the Lakeview Hotel, in Winchester street, Toronto.

The defendant denies that his wife had any interest in the hotel other than her interest in him as her husband.

This hotel, when purchased, did not include the land, but only the goodwill of the business, and the goods and chattels, stock in trade, and license to sell intoxicating liquors.

This hotel was sold in September, 1907, to one Willis C. Martin, for \$25,000; \$10,000 of this sum was paid to the defendant; the balance of \$15,000 remained on mortgage, and the interest was paid to the defendant during the years 1907 to 1912 inclusive.

It is alleged that the deceased, in May, 1905, lent to her husband \$2,200, and that later, namely, in August, 1914, she lent him the further sum of \$500.

It is alleged that the defendant used the profit made in carrying on the Lakeview Hotel business in purchasing a farm and residence, now occupied by him, at or near Cooksville.

The entire claim of the plaintiffs in this action is:—

1. For a declaration that the plaintiffs are the owners of one-half interest in the lands purchased by the defendant at Cooksville, as above.

2. (a) For a one-half interest in the profits of the Lakeview Hotel, and for a reference to determine the amount of the said profits.

(b) For judgment for \$5,000, and interest from the 10th September, 1907.

(c) Judgment declaring the plaintiffs entitled to one-half of the interest on unpaid principal for the years 1907 to 1912 inclusive.

3 and 4. For \$2,700 lent by the deceased to the defendant in May, 1905, and August, 1914, with interest on the \$2,200 from the 19th May, 1905, and interest on the \$500 from the 28th August, 1914.

The defendant denies specifically all the allegations in the plaintiffs' statement of claim.

The defendant pleads the Statute of Limitations, namely, R.S.O. 1914, ch. 75, secs. 5, 47, 49, and 50, in bar of the plaintiffs' claim.

The defendant further pleads the Statute of Frauds, 29 Car. II. ch. 3, sec. 4, R.S.O. 1914, ch. 102, secs. 2, 3, 5, 9, and 11, as there was no agreement in writing between himself and his wife.

The evidence seems to shew conclusively that the deceased wife aided largely in the success of the business, and it also shews that she was liberally and generously dealt with by the defendant.

It appears by the evidence that the deceased had saved a very considerable sum of money, as she had at her death a large sum to dispose of, and on one occasion it appeared that her husband allowed her to take \$5,000.

It does not appear that any question arose between the husband and wife as to partnership, or that there was any business or commercial arrangement between them.

It would require evidence of a most cogent character in order to establish a partnership between husband and wife where they had always lived amicably together, without any known arrangement between them.

Where business is being carried on by husband and wife, in

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such a way that the public having business and doing business with the concern would not know who was the proprietor, the presumption would be, if any presumption, that the business was that of the husband; and, in the absence of any proof to the contrary, an attempt on the part of the wife to establish ownership as a partner would fail.

In the present case there is no proof to the contrary of what the defendant asserts.

The plaintiffs rely upon the agreements for sale made with Willis C. Martin. The first of these is dated the 16th May, 1907, and in this agreement there is no recital of ownership. The wife of the defendant did sign as vendor, and there is the assertion as strong as any recital can make it that it was considered best, at least on the part of the purchaser, that the wife should join in the transaction.

No evidence was given at the trial of the particulars of the purchase by the defendant of the Lakeview Hotel property.

The property was purchased from the O'Keefe Brewery Company and G. J. Foy, the vendors being represented by an agent, who gave no information bearing upon the case as to ownership, or as to whose money was actually paid over for the property.

It is to be noticed that it was only the chattel property, stock of liquors, license, goodwill, etc., etc., that was bought, and not the land.

It may be that the property was taken in the name of both husband and wife. It appears to me that that would make no difference in this matter. The interest, to the extent of one-half, was not a gift to the wife, and so there is nothing but the bare statement of ownership, and the interest from time to time paid by the purchaser.

There is no doubt the wife acted, not only in the absence of her husband, but in his presence also, in receiving payments of money due to him in the business, and she received some money paid on account of interest on the balance of purchase-money—she did this as a wife assisting in the business, and not as a partner.

The second agreement is dated the 11th June, 1912, and was merely an extension of the time for payment, and carries the case no further than the first.

The third and last agreement is dated the 28th August, 1914.

This also was signed by the wife, styled as one of the vendors. It cannot be more than a declaration of part ownership, made in the presence of the defendant, and at the instance of the purchaser.

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I am of the opinion that the evidence does not go so far as to establish the claim of the deceased wife, as in the pleadings set up.

Upon the evidence, I am unable to find that the wife of the defendant was, or that the plaintiffs are now, entitled to an undivided one-half interest in the lands purchased by the defendant at or near Cooksville.

I am equally unable to find that the plaintiffs are entitled to a one-half share of the profits of the Lakeview Hotel business.

The plaintiffs, having failed to recover for the one-half of the proceeds of the sale of the Lakeview Hotel, must necessarily fail as to any interest thereon.

I am also of opinion that the plaintiffs cannot succeed as to the \$2,200 and \$500 claimed as loans made by the deceased wife of the defendant to him. The \$2,200 claimed as lent in May, 1905, if lent, is barred by the Statute of Limitations. The defendant denies ever getting money as a loan from his wife. It cannot, it seems to me, be held that there was an admission by the defendant of a loan of \$500, merely because, after an express denial, he answered a question in the following form:—

“Q. 229. The \$500 which you borrowed from your wife in 1914, that was the only amount that you ever borrowed from her?
A. Yes.”

I am unable to hold the defendant liable as trustee for his wife of any money or property, nor can I hold that the plaintiffs are entitled to charge the defendant as trustee in regard to either property or money.

The action will be dismissed, but under the circumstances without costs.

The plaintiffs appealed from the judgment of BRITTON, J.

January 29 and 30, 1918. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

D. L. McCarthy, K.C., and *T. L. Monahan*, for the appellants, argued that the wife had been an equal partner with her husband,

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and was entitled to one half of the \$7,500, being part of the first payment of \$10,000 received for the hotel property. This was borne out by the evidence presented at the trial, and also appeared from the agreement under which the hotel business was bought in 1900, now brought before the Court for the first time. Under the Married Women's Property Act, R.S.O. 1914, ch. 149, sec. 4, a married woman may now be a partner: *Gibson v. Le Temps Publication Co.* (1904), 8 O.L.R. 707; *Butler v. Butler* (1885), 16 Q.B.D. 374; *Smith v. Smith* (1800), 5 Ves. 189; *Mercier v. Mercier*, [1903] 2 Ch. 98. In any event the plaintiffs are entitled to follow the assets of the partnership, or in the alternative to have the partnership accounts taken, and the assets divided. The claim for \$500 lent by the wife to the husband was proved by the latter's own testimony. Then there was a small sum of \$37.50 interest due the wife, and paid to the husband.

H. J. Scott, K.C., and *J. C. Thompson*, for the defendant, respondent, contended that there had been no partnership between the husband and wife. There could be none. At most there was joint ownership with right of survivorship. But, in any event, the wife was barred by the Limitations Act from enforcing her claim after six years from the receipt of the \$10,000 by the husband: *In re Lady Hastings* (1887), 35 Ch. D. 94; *In re Young* (1885), 28 Ch. D. 705; *Noyes v. Crawley* (1878), 10 Ch. D. 31; *Lindley on Partnership*, 7th ed., pp. 551-553. The husband was not a trustee for his wife in such a way as to prevent the Statute of Limitations from running: *Knox v. Gye* (1872), L.R. 5 H.L. 656; *Betjemann v. Betjemann*, [1895] 2 Ch. 474.

McCarthy, in reply, said that the Statute of Limitations did not apply because the partnership did not end until 1912, the defendant being in receipt of interest on a large amount of the purchase-money. At any rate, the statute would not run because the husband was a trustee for the wife of her share.

March 25. CLUTE, J.:—Appeal from the judgment of Britton, J., delivered the 8th December, 1917, dismissing the plaintiffs' action without costs.

The plaintiffs, Mabel Faye and Gertrude Faye, sue as executors and trustees under the last will and testament of Susan Roumegous, deceased, late wife of the defendant.

The statement of claim sets forth that the defendant and his wife were the owners of the Lakeview Hotel, Winchester street, Toronto, during the years 1900 to 1907, both inclusive, and that the said Susan Roumegous was entitled to a one-half interest in the profits of the said hotel business during the said years. It further charges that the defendant received all the profits of the business during those years; that a sale was made of the said business to one Willis C. Martin in September, 1907, for \$25,000, \$10,000 of which was paid on the 10th September, 1907, to the defendant, who did not then pay, and has not since paid, any part thereof to the said Susan Roumegous or to the plaintiffs. The plaintiffs claim interest on the balance of the purchase-money. It is further alleged that in 1905 the deceased Susan Roumegous lent to the defendant the sum of \$2,200, and in August, 1914, the further sum of \$500. The profits of the business were used and expended in the purchase of certain lands known as the Cooksville property, in the county of Peel. And the plaintiffs claim: (1) a half-interest in the said lands in the county of Peel, particularly described in the writ of summons; (2) or in the alternative: (a) a declaration that the plaintiffs are entitled to a one-half share of the profits of the said hotel business; (b) judgment for \$5,000 and interest; (c) one-half of the interest on the balance of the purchase-money for the years 1907 to 1912 inclusive; (3) judgment for \$2,200 and interest; (4) judgment for \$500 and interest.

The defendant denies all the allegations in the plaintiffs' statement of claim, and avers that Susan Roumegous has no valid or enforceable claim against him; that during the lifetime of his wife he satisfied all claims, if any, which she had or made against him to the time of her death. The defendant pleads the Statute of Limitations and the Statute of Frauds as a bar to the plaintiffs' claim. The defendant further says that the plaintiffs have no agreement, or memorandum or note thereof, entitling them to any interest in the said lands in the county of Peel, and pleads the Statute of Frauds in respect thereto.

The defendant married his said wife in 1877, in Fall River, Massachusetts, and shortly thereafter they came to Toronto and engaged in the restaurant business, and were prosperous from the beginning. It is said that they had but \$4 capital, raised by

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pawning her jewellery, to begin with. During the whole period they both took an active part in the business. It is unnecessary to inquire whether they were partners or not prior to the purchase of the Lakeview Hotel. At the trial the agreement for purchase was not produced, and it was not established to the satisfaction of the trial Judge that the wife had any interest therein.

Upon the argument in appeal, the agreement of purchase was for the first time produced, and by consent made part of the record. It is dated the 2nd day of May, 1900, and made between O'Keefe's Brewery Company and G. J. Foy, wine-merchant, vendors, and Achille Roumegous and the said Susan E. Roumegous, his wife, the vendees. It recites that the vendors are the owners of the Lakeview Hotel, and also of the goods, chattels, household stuff, and stock of wines, liquors, cigars, etc., on the said premises, and that the license of the said hotel is the property of the vendors, though held in the name of one M. A. Harper; "and whereas the said parties of the first part" (the vendors) "have agreed to sell and the parties of the second part" (the vendees) "have agreed to buy the goods, chattels, household stuff, and effects now on said premises and to take a lease of the said hotel at a rental of \$1,250 per annum for ten years, and to pay taxes on said hotel, and to take a transfer of the said license from M. A. Harper, the said parties of the second part to pay the license fee for the current year, at and for the price of \$11,000, \$6,000 cash, the balance to be secured by chattel mortgage for said goods and stock and license, repayable \$1,000 per annum, interest at 6 per cent., this agreement to be void if the License Commissioners refuse to transfer said license, in which case the \$6,000 paid is to be repaid by the said parties of the first part to the said parties of the second part. Stock of wines, liquors, cigars, ale, porter, etc., to be taken, previous to possession being taken, and to be paid for at invoice prices by the said parties of the second part in six notes, at one, two, three, four, five, and six months; all of which the said parties hereto agree for themselves and for their respective successors, administrators, and assigns, each with the other of them respectively, faithfully to do, abide by, perform, and keep."

The document is signed by all the parties thereto.

It will be seen from this agreement that what was bought was the going business, including the license and a lease of the premises,

and the wife became, equally with the husband, liable for the payment of the purchase-money.

The business so purchased was carried on by the defendant and his wife until the 16th May, 1907, when a sale thereof was made by the defendant and his said wife to one Willis C. Martin for \$25,000. The deed, which is under seal, sets forth that "the vendors agree to sell to the purchasers, and the purchasers agree to buy from the vendors, all and singular the goodwill of the Lake-view Hotel . . . together with the license to sell liquors . . . and all the goods, chattels, bar-fixtures, and furniture in the said building and the vendors' stock in trade of wines, liquors, spirits, cigars, etc., of all kinds, upon the said premises at the date of the closing of the sale, and the existing lease of the said premises to be assigned to the said purchaser, with the assent of the landlord of the said premises, at and for the price or sum of \$25,000," with certain terms of payment and conditions, one clause of which is: "the sale is to include any license-fee already paid by the vendors," etc.

The form of the purchase and of the sale of this business, including as it does the goodwill, license, furniture, and stock in trade, and lease of the premises, puts it beyond all doubt, in my opinion, that the business was that of both husband and wife, and that they held and carried on the same in equal shares as partners.

An extension of time being desired by the purchaser, a further agreement was entered into between the vendors and the purchaser, dated the 11th June, 1912, which recites the agreement of purchase and the terms of payment therein, and that interest has been paid on account thereof till the 10th June, and the payment of a further sum of \$5,000 on account of purchase-money on the date thereof (11th June, 1912), and that the purchaser has requested the vendors to extend the time for payment of \$10,000. The agreement then provides that the payment of the \$10,000 is extended to the 1st day of September, 1914, with interest from the 10th June, 1912, at 6 per cent., payable quarterly, on the first days of March, June, September, and December in each year. It further provides that the purchaser agrees with the vendors, upon their request, to give a chattel mortgage upon the license, goodwill, and stock in trade, to secure the unpaid balance of the

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purchase-money, and "this agreement shall, from the date thereof, be read and considered along with the said agreement of the 16th day of May, 1907, and treated as part thereof, and for such purpose the said agreement of the 16th May, 1907, shall be regarded as being hereby amended, and the said agreement, together with all the covenants and provisions thereof as so amended, shall be and continue to be in full force and virtue, and shall be binding upon and enure to the benefit of not only the parties hereto but to and upon their respective heirs, administrators, successors, and assigns."

There is a receipt dated the 28th August, 1914, signed by the defendant and his wife, acknowledging that they have received from the said Martin the sum of \$5,000 "*re* Lakeview Hotel," and the sum of \$139.93 in full of all interest to the 10th September, 1914. It is admitted that the wife received one-half of this sum and of the previous payment of \$5,000, and her share of the interest.

On the 28th August, the same date, a further agreement was entered into between the vendors and the purchaser for a further extension of time. The agreement recites the agreement for purchase and the agreement for extension of time and the request to extend the time for the payment of the remaining \$5,000 to the 10th September, 1916. The payment of the \$5,000 covered by the said receipt is acknowledged, and the time of payment is extended to the 10th September, 1916. The terms of this extension are very similar to the former, including the agreement to give a chattel mortgage upon the license, goodwill, and stock in trade of the purchaser, and the same is to be read and considered along with the said agreement of the 16th May, 1907, and to enure to the benefit of the parties and their personal representatives.

Upon the argument, counsel for the plaintiffs was content to limit his claim to one-half of \$7,500, with interest, being part of the first payment of \$10,000, less a portion thereof used in the payment of the debts of the said business, and the said \$5,000 with interest; the wife having received during her lifetime one-half of the two payments each of \$5,000 and interest.

It was not disputed that the husband had received the \$10,000, being the first payment on the purchase-money, and it further appeared from his evidence that he had expended the money re-

ceived from the business in the purchase of the Cooksville property. It also further appeared from the defendant's evidence that he had received the \$500 from his wife on the date mentioned. It was urged on behalf of the defence, however, that there was no partnership in respect of the Cooksville property, in the sense that the business of running the farm and vineyard was carried on by the defendant and never jointly as a business concern. But it was contended by Mr. McCarthy that the plaintiffs were entitled at all events to follow **the** assets of the partnership, and were entitled to have it declared that there was a lien thereon in favour of the partnership to the extent at least of the balance claimed by the plaintiffs for the sale of the business to Martin; or, in the alternative, to have the partnership accounts taken and the partnership assets divided.

I think it sufficiently appears from the evidence that the partnership liabilities were paid from time to time out of the profits of the business, and that the purchase-money on the sale to Martin represented the net assets of the business, less about \$2,500 of liabilities, which were paid out of the first payment of \$10,000.

I reach the conclusion as to the equal ownership of the wife in the business from the documents referred to and the manner in which the business was carried on. The evidence of the plaintiffs supports this view, but is not, in my opinion, necessary.

The result is that the plaintiffs are entitled to recover one-half of \$7,500, unless precluded by the Statute of Limitations.

Before the Married Women's Property Act a married woman had no separate estate; could not enter into any contract binding on herself except in certain cases; and so could not have been a partner. But since that Act a married woman has power to contract, even though she has no separate estate, so as to bind any separate estate she may subsequently acquire. She can therefore now be a partner: R.S.O. 1914, ch. 149, sec. 4.

The Married Women's Property Act, 1884, 47 Vict. ch. 19, was amended in 1887 (see 50 Vict. ch. 7, sec. 22), by introducing the words now in sec. 7, sub-sec. (1), "in which her husband has no proprietary interest," and this so appears in the Revised Statutes of 1887, ch. 132, sec. 5. This amendment was not introduced to curtail the rights of a married woman, but rather to enlarge them:

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Gibson v. Le Temps Publication Co., 8 O.L.R. 707, 708, where it is said: "A married woman can, in all respects and for all purposes, contract with her husband, as if she were a *feme sole*, every contract made by her being deemed to be made with respect to and to bind her separate property, whether she is or is not in fact possessed of separate estate at the date of the contract:" *per Anglin, J.*; see Eversley on Domestic Relations, 3rd ed., p. 334.

The sale of the hotel to Martin was a sale of property in which the wife had an equal interest with her husband. It included their entire business and the assets. This, while not formally dissolving the partnership, put an end to the business as carried on by them. What, then, was her right to her share of the first payment? It was a joint and equal right with her husband. He received the amount; he was liable to account to her for the same. The question is, would the Statute of Limitations operate so as to preclude her from bringing an action for a partnership account after six years from such receipt? I think it would.

Upon the argument the question whether or not the husband could be regarded as a trustee for the wife of this amount, and so make the statute inoperative, was raised. This question is covered by authority. He is not a trustee for her in the full sense of that word, which would preclude the Statute of Limitations from applying: Lindley on Partnership, 7th ed., pp. 531-553. So long as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the Statute of Limitations has no application, but as soon as the partnership is dissolved or there is any exclusion of one partner by the others the case is different and the statute begins to run: *Noyes v. Crawley*, 10 Ch.D. 31. See also Lindley on Partnership, 7th ed., p. 553, where *Knox v. Gye*, L.R. 5 H.L. 656, is referred to, in which a surviving partner relied on the Statute of Limitations as a defence to a suit for an account instituted by an executor of a deceased partner, who had died more than six years before the filing of the bill. The surviving partner had, however, continued the partnership business, and had got in outstanding assets within six years. The decision of Wood, V.-C., who held that the statute was not a bar to the suit, was reversed by Lord Chelmsford on appeal, and the House of Lords affirmed Lord Chelmsford's decision. The question turned upon whether or not a partner, who had received

money belonging to the partnership, could be regarded as a trustee within the Trustee Act: see R.S.O. 1914, ch. 75 (the Limitations Act), sec. 47, providing: "In this section 'trustee' shall include an executor, an administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee, and shall also include a joint trustee." And (sub-sec. (2): "In an action against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—(a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee"

There was no suggestion of fraud in the present case, and the question is, whether the defendant was a trustee within the exception in sub-sec. (2).

Lord Westbury in *Knox v. Gye*, L.R. 5 H.L. 656, held that there is no fiduciary relation between a surviving partner and the representatives of his deceased partner. In that case the partnership was dissolved in 1854, and the bill was filed in 1864. In that respect it differs from the present case, as more than six years had elapsed after the death of the partner. In the present case Susan Roumegous, the defendant's wife, died on the 10th September, 1916; probate was issued on the 14th February, 1917; and this action was commenced on the 9th October, 1917. Lord Westbury points out (p. 672) that the statute provides (see R.S.O. 1914, ch. 75, sec. 50, which is similar to the English Act) that "no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit." He points out (p. 673) that the appellant there relied upon the claim against Hughes having been received and realised within six years before the commencement of the suit, and proceeds:—

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"The question is, was that claim against Hughes, that debt due to the partnership, a thing comprised in the same account? An account of the partnership estate would unquestionably comprise that claim, and the statute was directed, as we all know, against the erroneous notion that an account which had been barred by the lapse of six years after the last entry in the account might be considered as opened and revived by the receipt of a subsequent sum of money more than six years after the date of the last entry. It removes that notion, provided the receipt after the six years is the receipt of an item comprised in the original account."

He points out (p. 673) that the payment was made in 1861, and that, after the right to the account was taken away by the statute previously to the receipt of such item, the subsequent receipt cannot remove the bar and restore the title to the account. He points out also (p. 675) that the representative of a deceased partner has no specific interest in, or claim upon, any particular part of the partnership assets.

"The whole property therein accrues to the surviving partner, and he is the owner thereof both at Law and in Equity. The right of the deceased partner's representative consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership."

He then deals (p. 675) with the meaning of the word "trustee." "The surviving partner is often called a 'trustee,' but the term is used inaccurately. He is not a trustee, either expressly or by implication. On the death of a partner the law confers on his representatives certain rights as against the surviving partner, and imposes upon the latter corresponding obligations. The surviving partner may be called, so far as these obligations extend, a trustee for the deceased partner . . . but the trust is limited to the discharge of the obligation, which is liable to be barred by the lapse of time; as between the express trustee and the *cestui que trust* time will not run; but the surviving partner is not a trustee in that full and proper sense of the word."

And again (p. 676):—

"The mistaken phrase that a surviving partner is a trustee, and that therefore no time can run as between him and the representative of the deceased partner, has led to what I humbly conceive to be the error in the judgment originally given.

"There is nothing fiduciary between the surviving partner and the dead partner's representative, except that they may respectively sue each other in Equity. . . . it is a mistake to apply the word 'trust' to the legal relation which is thereby created."

Lord Colonsay (p. 677) held that the Statute of Limitations does not apply to a suit brought by the executor of a deceased partner against the surviving partner demanding an account of the partnership concerns.

Lord Hatherley, L.C., strongly dissented, and expressed (p. 678) his surprise to hear "that there is nothing fiduciary between a surviving partner and the executors of his deceased partner."

This case was referred to in *Gordon v. Holland* (1913), 82 L.J.P.C. 81, decided on appeal to the Privy Council from the Court of Appeal for British Columbia; and it was there held that a partner who, improperly and without the knowledge of his partner, has sold partnership property to a *bonâ fide* purchaser for value without notice, and has afterwards repurchased it from him, stands in a fiduciary relation to his partner, and cannot take advantage of the rule which protects a purchaser with notice taking from a purchaser without notice, but is liable to account for profits made by subsequent dealings with the property.

That case also differs from the present. It will be observed that the partnership property was sold without the knowledge of the partner, and that it was bought back from the purchaser.

Lord Atkinson delivered judgment, and at pp. 87, 88, referring to *Knox v. Gye*, said:—

"Lord Westbury laid it down broadly that to describe a surviving partner as a trustee for the representative of a deceased partner was a misapplication of language, that there was no fiduciary relation between them, and that the right of the deceased partner's representative 'consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership.'

"The then Lord Chancellor (Lord Hatherley) dissented strongly from this doctrine, and seems to lay it down, that as all the property of a partnership vests by survivorship in a surviving partner, he, as to the share of that property to which the deceased

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partner would have been entitled, stands to the representative of the deceased in the relation of a trustee.

"The point was not dealt with by the other noble Lords who took part in the hearing, and it was not necessary to rule it for the purposes of the decision of the case, which turned entirely on the section of the statute. In *Piddocke v. Burt*, [1894] 1 Ch. 343, Mr. Justice Chitty decided that a partner who receives assets of the partnership on behalf of himself and his co-partners does not in respect of those assets come within the words of section 4, sub-section 3, of the Debtors Act, 1869, 'as a trustee or person acting in a fiduciary capacity.'"

The *Gordon* case was distinguished from *Knox v. Gye* and *Piddocke v. Burt* because the sale of the land was from the first illegal and wrongful, and the appropriation of the proceeds was in effect a fraud against the co-partner, in order to keep the proceeds which could be gained by sales in a rapidly rising market.

In *Betjemann v. Betjemann*, [1895] 2 Ch. 474 (C.A.), it was held that, although the old partnership was terminated in that case by the death of the father, the Statute of Limitations was no bar to taking the accounts before that date, the accounts having been carried on into the new partnership without interruption or settlement; and it was also there held that, if the Statute of Limitations had applied, the fact that there had been concealed fraud would have been a bar to its operation, although such fraud might have been discovered at the time by the exercise of due caution; a partner being entitled to rely on the good faith of his co-partners. *Knox v. Gye* was distinguished, and *Rawlins v. Wickham* (1858), 3 DeG. & J. 304, followed.

In *Barton v. North Staffordshire R. W. Co.* (1888), 38 Ch.D. 458, reference is made (at p. 463) to *Knox v. Gye*, *supra*, as settling the point that, after a partnership has ceased, any claim on simple contract by one former partner against the others in respect thereof is *primâ facie* subject to be barred after the expiration of six years.

"On the other hand, while a partnership is continuing there is no authority for suggesting that a claim between the partners is affected by the statute, and the opinion of Lord Justice Lindley is to the contrary (Lindley on Partnership, 4th ed., p. 966)."

The question then here is, what was the effect of the sale of

the entire partnership business, including goodwill, and the receipt by the defendant of the first payments? Was not that in effect a termination of the partnership? There was no evidence whatever that the business as such was carried on in any other manner. The evidence is to the contrary. It, as a matter of fact, having been sold out entire, that business ceased to exist, except for the purpose of having its affairs wound up. In my opinion, a right of action immediately accrued to the wife for an account and to recover her share of the payment made on the sale. That being so, as I think, *Knox v. Gye* is in point, and the Statute of Limitations applies. See Halsbury's Laws of England, vol. 22, pp. 85, 86, para. 167, where it is said that a partnership for a fixed term or for a single adventure, is dissolved by the expiration of the term or by the completion of the adventure, as the case may be, except so far as it is deemed to continue for the purpose of winding up its affairs. In this case the partnership assets were sold out, and the liabilities appear to have all been paid out of the first payment of the purchase-money. The right of action, therefore, for one-half of the remaining portion of the first payment accrued to the wife. The partnership was determined by their act and deed. They changed their place of residence, and ceased further to engage, so far as the evidence shews, in any joint business whatever.

In *Crawshay v. Collins* (1808), 15 Ves. 218, Lord Eldon, L.C., laid it down (pp. 226, 227) that:—

“There may be a partnership, where, whether the parties have agreed for the determination of it at a particular period, or not, engagements must, from the nature of it, be contracted, which cannot be fulfilled during the existence of the partnership; and the consequence is, that for the purpose of making good those engagements with third persons it must continue; and then, instead of being, as it was, a general partnership, it is a general partnership; determined, except as it still subsists for the purpose only of winding up the concerns.”

That covers this case. The partnership was in fact wound up, except for each partner to receive the payments that were made under the terms of sale.

Again, in *Cruikshank v. McVicar* (1844), 8 Beav. 106, *per* Lord Langdale, M.R., at p. 116:—

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"When the partnership business is, in one sense, at an end, still you have not, therefore, put an end to the joint transactions; they must necessarily be carried on, for the purpose of winding up the concern and every thing belonging to it."

In *Noyes v. Crawley*, 10 Ch. D. 31, at p. 39, Malins, V.-C., treated a dissolution or a termination as the same thing with regard to the application of the Statute of Limitations.

The test seems to be, when did the right of action accrue? There can be no doubt, I take it, that the wife might have brought suit for an account or for her share of the first payment.

It is said in Halsbury's Law of England, vol. 19, p. 47, para. 71, that, while a partnership is subsisting, the statute has no application to the claim of one partner against another in respect of rights arising out of the partnership; and for this proposition are cited the cases above referred to, with one additional case, namely, *Chan Kit San v. Ho Fung Hang*, [1902] A.C. 257, where it was held, under a similar statute of limitations, that the statute ran from the granting of letters of administration.

The result is that the appellants fail in respect of the claim to one-half of the \$7,500, part of the first payment of purchase-money.

Then with respect to the \$500 said to have been lent by the wife to the husband. In dealing with this branch of the case the learned trial Judge says:—

"The defendant denies ever getting money as a loan from his wife. It cannot, it seems to me, be held that there was an admission by the defendant of a loan of \$500, merely because, after an express denial, he answered a question in the following form:— 'Question: 229. The \$500 which you borrowed from your wife in 1914, that was the only amount which you ever borrowed from her? A. Yes.' "

The defendant's evidence is conclusive as to having borrowed the \$500 from his wife.

At p. 49 of the evidence, examined by his own counsel, he says:—

"Q. Did you give her any money? A. When we went in 1914 she asked me for some money and I said, 'There is the money, take what you want.' There was \$5,000 cash there, and she took \$2,500, and she lent me \$500 the next day because I had money to pay."

On cross-examination, at p. 74, Mr. McCarthy, referring to the payment of \$2,500 in 1912, asked:—

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"Q. And she got \$2,500 and you got \$2,500? A. Yes.

"Q. And out of her \$2,500 you borrowed \$500? A. Yes.

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"Q. I am wrong about that, you did not borrow \$500 from her until 1914? A. Yes.

"Q. Then in 1914 you borrowed \$500 from her? A. Yes.

"Q. You say you paid that back in hospital and doctors' bills? A. Yes.

"Q. You say that is the way you paid it back? A. Yes.

"Q. The cheque for interest from Mr. Martin of the 1st September, 1916, for \$37.50, was endorsed by you and paid over to your bank was it? A. Yes.

Q. Now, in reference to the time that she gave you \$500, how did that happen? A. Well, that was for payment on a mortgage; in two or three days I said, 'You want that money now?' She said, 'No, the money will pay doctors and so forth.'

"Q. When did she get the \$500? A. In 1914 she received \$2,500.

"Q. This \$500 she handed to you was part of the \$2,500 she got? A. Yes."

In view of this evidence, which is not contradicted in any way, it is clear, I think, that the defendant borrowed from his wife \$500, which he never repaid. He says he expended the same for hospital and doctors' bills. This affords no defence to the claim—he was liable personally for expenses incurred at the hospital and for doctors' bills for his wife: Eversley on Domestic Relations, 3rd ed., p. 323; Macqueen's Rights and Liabilities of Husband and Wife, 3rd ed., pp. 95-102; Lush's Law of Husband and Wife, 3rd ed., pp. 366-386.

The evidence is also clear that the item of interest \$37.50, due to the wife, was paid to the husband and deposited by him to his own account, and that the plaintiff is entitled to judgment also for that amount.

The evidence is as follows:—

"Q. Now then, her cheque, the cheque for interest, from Mr. Martin, of the 1st September, 1916, for \$37.50, was endorsed by you and paid over to your bank, was it? A. Yes.

"Q. Why? That was two days before her death? A. That was one week before she died.

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"Q. Two days before she died. How was that? A. I received the money.

"Q. You received her money? A. Yes, I received that money

"Q. You endorsed it and got the money? A. Yes, I received that money."

The judgment of the Court below should be set aside, and judgment entered for the plaintiffs for \$537.50; and, having regard to all the circumstances of the case and the amount recovered, with County Court costs and costs of this appeal, without a set-off.

MULOCK, C.J.Ex., and SUTHERLAND and KELLY, JJ., agreed with CLUTE, J.

RIDDELL, J.:—I have had the advantage of reading the judgment of my brother Clute, and agree in the findings of fact and the conclusions of law generally.

It seems to me clear that the husband was the trustee for the wife of her half of the proceeds of the sale of the business—not indeed an express trustee, but a constructive trustee. In such a trust, it is well decided that the Statute of Limitations runs: consequently the defendant may set up that defence.

Both from the transaction itself and from the dealing of the parties, I think it plain that the wife could claim half of each payment as it was made—the terms of payment were known to her, if not from the first—although that is most likely—at least from the time of the payment in January, 1912, and tacitly approved by her. The statute then would begin to run in favour of the defendant only on the payment of an instalment and only as to that instalment. He could not have been called upon to account for what he had not yet received.

There is yet a sum of \$5,000 unpaid; and, to save further litigation, we should now make a declaration that the plaintiffs are entitled to half that sum as and when it is paid.

With that declaration, in addition to judgment for \$537.50, I would allow the appeal with Supreme Court costs here and below.

*Judgment as stated by CLUTE, J.; RIDDELL, J.,
dissenting in part.*

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WALSH v. WILLAUGHAN.

Mortgage—Finding as to Amount of Principal Due thereon—Mortgage Given in Part to Raise Money to Make Down-payment on Agreement for Purchase of other Land from Mortgagee—Default of Purchaser under Agreement—Notice of Cancellation Given by Vendor—Abandonment by Purchaser—Forfeiture of Down-payment—Conduct of Purchaser.

W. bought land (parcel A) from S. for \$2,000, of which \$500 was to be paid in cash and the remainder by instalments. W., not having \$500 to make the down-payment, and requiring \$200 as well, made a second mortgage in favour of S. upon another parcel of land (parcel B) for \$700; he received \$200 from S., and S. apparently treated the down-payment as made. W. paid no further sum upon his agreement to purchase parcel A, but he went into possession and made some slight improvements. Pursuant to provisions in the agreement, S. gave notice of cancellation; and W., being unable to pay, and not desiring to carry out his agreement, went out of possession. W. having made default in respect of the first mortgage upon parcel B, the first mortgagee brought this action to enforce it; a reference was directed to take the accounts; S. was added as a party in the Referee's office, and it was found that \$700 was due upon S.'s second mortgage. W. contended, however, that the mortgage was security for \$200 only, S. having rescinded the agreement of purchase:—

Held, that the mortgage to S. was not, as contended, to the extent of \$500, merely security for the payment of that sum upon the agreement of purchase; the mortgage must be construed as given for \$700 actually lent; and the rescission of the agreement did not affect the consideration mentioned in the mortgage.

Fraser v. Ryan (1897), 24 A.R. 441, distinguished.

(2) Upon the rescission of the contract by the vendor, the purchaser is not in all cases entitled to a return of moneys paid on account of the contract. In this case the real cause of the rescission was the purchaser's default; and he, not seeking specific performance nor submitting his willingness to carry out the contract, was not entitled to repayment of the \$500 regarded as money paid by him under the contract.

Review of the authorities.

Boyd v. Richards (1913), 29 O.L.R. 119, and *Steedman v. Drinkle*, [1916] 1 A.C. 275, distinguished.

Howe v. Smith (1884), 27 Ch.D. 89, and *Stickney v. Keeble*, [1915] A.C. 386, specially referred to.

A purchaser who is unable to carry out his contract will not be allowed to abandon his purchase and claim the return of his part payments, when the vendor has given formal notice of cancellation.

Judgment of the County Court of the County of York, affirmed.

An appeal by the defendant Willaughan, the mortgagor, in a mortgage action, from an order made by the Senior Judge of the County Court of the County of York dismissing the appeal of the defendant Willaughan from the report of a Referee finding the defendant Stephens entitled upon his mortgage security to the principal sum of \$700.

The defendant Stephens had a second mortgage upon land covered by a first mortgage and a third mortgage in favour of the

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plaintiff. Stephens was made a defendant upon the reference, in the character of a subsequent incumbrancer.

The defendant Willaughan made the mortgage to Stephens for \$700: of this \$200 was advanced to Willaughan. The remaining \$500 represented the down-payment upon the purchase by Willaughan from Stephens of other land; and the contention of Willaughan was, that, as the contract for the purchase of the other land had been terminated or rescinded, the mortgage to Stephens was security for \$500 only.

January 30. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

H. T. Beck, for the appellant and for the plaintiff, argued, first, that the mortgage to the defendant Stephens, to the extent of \$500, was security only for that amount as part of the purchase-price of the other land; and that, the contract for the sale and purchase of the other land having been rescinded, Stephens was not entitled to payment of the \$500 paid by giving the mortgage: *Fraser v. Ryan* (1897), 24 A.R. 441. Secondly, the contract having been rescinded, the appellant was entitled to repayment of the \$500 paid by giving the mortgage, regarding the claim of Stephens to retain that sum as the enforcement of something in the nature of a penalty: *Steedman v. Drinkle*, [1916] 1 A.C. 275, 25 D.L.R. 420; *Kilmer v. British Columbia Orchard Lands Limited*, [1913] A.C. 319, 10 D.L.R. 172; *Labelle v. O'Connor* (1908), 15 O.L.R. 519; *Boyd v. Richards* (1913), 29 O.L.R. 119, 13 D.L.R. 865.

Gideon Grant, for the defendant Stephens, respondent, contended, as to the first point, that the mortgage was not a collateral security for the down-payment under the contract, but was an indebtedness for money advanced, and was not affected in any way by the rescission of the contract. As to the second contention, Willaughan abandoned the contract and refused to carry it out, and the subsequent rescission by the vendor was Willaughan's own fault. Therefore the cases cited for the appellant did not apply, as in these cases the party relieved had been willing and able to carry out his part of the contract. There were many cases where, owing to the conduct of the purchaser, the vendor might rescind, and also retain the deposit: *Howe v.*

Smith (1884), 27 Ch. D. 89; *Collins v. Stimson* (1883), 11 Q.B.D. 142; *Sprague v. Booth*, [1909] A.C. 576; *Cornwall v. Henson*, [1900] 2 Ch. 298; *Stickney v. Keeble*, [1915] A.C. 386; *Brickles v. Snell*, [1916] 2 A.C. 599, 30 D.L.R. 31.

Beck, in reply.

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March 25. MULOCK, C.J. Ex.:—This is an ordinary mortgage action upon two mortgages (a first and third mortgage), made by the defendant Willaughan. Before the execution of the latter mortgage, the defendant had made a second mortgage to one Stephens to secure payment of \$700 and interest; and Stephens, as a subsequent incumbrancer, was added as a party defendant.

Before the Referee, Willaughan contended that \$200 principal only was recoverable upon the mortgage. The Referee, however, found \$700 principal owing; his finding was affirmed by the learned Senior Judge of the County Court of the County of York; and this appeal is from the Judge's decision.

The circumstances which have given rise to the dispute are as follows:—

Edgar T. Stephens, being the owner of certain lands in the township of Vaughan, in the county of York, negotiations were entered into between him and the defendant Willaughan for the sale of the lands by Stephens to Willaughan, and the parties reached a verbal understanding. The vendor required a down-payment of \$500 at the time of the execution of the proposed contract. Willaughan was unable to pay this amount in cash, and further desired to borrow from Stephens \$200. Accordingly it was arranged between them that Stephens should enter into a written contract with Willaughan for the sale of the land to him for \$2,000, and that Willaughan should give to Stephens a mortgage on certain other lands owned by Willaughan, in respect of the down-payment of \$500 and also the \$200 to be advanced.

This arrangement was carried out; and, by agreement bearing date the 18th December, 1914, made between Stephens, the vendor, and Willaughan, the purchaser, Stephens agreed to sell his lands to Willaughan for \$2,000, payable as follows: "\$500 on or before the execution of this agreement and the balance in consecutive quarterly instalments of \$25 each, together with the interest thereon from the date hereof, at the rate of 6 per cent. per annum,

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on the balance of the purchase-price remaining unpaid from time to time both before and after the maturity of this agreement, on the days hereinafter mentioned, until the whole of the said purchase-money has been fully paid and satisfied, the first instalment as aforesaid to be due and payable on the 18th December, 1915, and thence on the 18th days of March, June, September, and December, until the 18th December, 1919, when the balance of the principal sum shall be paid."

This contract, amongst other stipulations, contains the following:—

"It is expressly understood and agreed that if the purchaser fails to make the payments aforesaid or any of them within the times above limited respectively, or fails to carry out in their entirety the conditions of this agreement in the manner and within the times above mentioned, the time of payment aforesaid being of the essence of this agreement, then the vendor may mail to the purchaser a notice in writing, signed by the vendor or his agent or attorney and enclosed in an envelope, post-paid and addressed to the purchaser at Toronto or delivered to the purchaser personally, to the effect that, unless such payment or payments so in arrear is or are paid, or such conditions or breach of conditions are complied with, within thirty days from the mailing thereof, this agreement shall be void; and, upon said notice being so mailed and upon the purchaser continuing such default for the space of thirty days thereafter, all rights and interests hereby created or then existing in favour of the purchaser or derived under this agreement shall forthwith cease and determine, and the lands hereby agreed to be sold shall revert to and re-vest in the vendor without any declaration of forfeiture or notice (except as hereinbefore mentioned) and without any act of re-entry or any other act by the vendor to be performed, or any suit or legal proceedings to be brought or taken, and without any right on the part of the purchaser to any reclamation or compensation for moneys paid thereon or to damages of any kind whatever."

The contract also contained the following stipulation:—

"A statutory declaration by the vendor, or his assigns for the time being, that such default has been made, and that this agreement has been declared null and void by the vendor for that or

any other reason set forth in the preceding paragraph hereof, shall be conclusive evidence thereof and of the termination of the agreement and of all the vendor's rights hereunder."

Simultaneously with the execution of that agreement, the defendant Willaughan conveyed his lands by way of a mortgage to Stephens to secure payment of \$700, with interest thereon, covenanting therein to pay the principal sum of \$700 on the 18th December, 1917, and the interest yearly, and Stephens at the same time advanced to Willaughan the \$200 above mentioned. Willaughan then entered into and for about one year remained in possession of the lands covered by the contract. He made no lasting or valuable improvements; all he did was to fence in a portion of the land and erect a couple of "shacks," at a cost not exceeding \$100.

He then vacated possession, and has paid nothing on account of the purchase-money except the \$500. The evidence shews that not only did he not keep up the payments which the contract called for, but was unable to do so.

On the 5th January, 1916, Stephens gave written notice to Willaughan that an instalment of principal, \$25, together with \$90 of interest on the unpaid purchase-money, had become due, and, if not paid on or before the 11th February thereafter, the agreement would, pursuant to the provisions in the same, be void; but Willaughan still remained in default.

Subsequently Stephens made the statutory declaration contemplated by the stipulation above quoted, as to the purchaser's default and declaring the agreement null and void.

One of the defendant Willaughan's contentions is, that the mortgage, to the extent of \$500, is security only for \$500, part of the contract price, and that, the contract having been rescinded, the mortgagee is not entitled to payment of the \$500.

His other contention is, that the contract was rescinded by the vendor; and that, in consequence, he (the defendant Willaughan), being the purchaser, is entitled to re-payment of the \$500 paid by the purchaser Willaughan by the giving of the mortgage in question.

As to the first contention, the mortgage, I think, was intended to extinguish the defendant's indebtedness in respect of the down-payment of \$500 owing under the contract. It does not purport to be collateral security, but is given "in consideration of \$700

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now paid by the mortgagee to the said mortgagor," and it is not payable for three years. The mortgagor unconditionally covenants to pay the \$700 at the expiration of that period. There is no pretence that the mortgage is not security for the \$200 cash lent, and that sum is added to the \$500, and the one total sum of \$700 is treated throughout the mortgage as an actual indebtedness for money then advanced. The covenants throughout apply to the \$700, their language being as applicable to the whole as to any part of the consideration-money.

Further, the parties themselves concede that the defendant, by the giving of the mortgage, had actually paid the \$500; for, by another written agreement of the same date between them, and being part of the whole transaction, reference is made to the contract in question, and (referring to the contract price) it contains these words: "On which there is yet to be paid \$1,500."

Thus, the parties at the time considered that the giving of the mortgage satisfied \$500, part of the contract price, and to that extent reduced the vendor's lien for unpaid purchase-money.

Further, it is not open to doubt that the giving of the mortgage was intended to relieve Willaughan from the stipulation contained in the contract which required him to make a cash-payment of \$500, but it cannot so operate unless it is treated as a payment, for the mortgage does not refer to the contract, and parol evidence would be inadmissible to vary the stipulation.

For these various reasons, I am of opinion that the giving of the mortgage satisfied the \$500 in question. The \$500, part of the consideration-money, does not represent any part of the contract price, and the mortgage must be construed as given for \$700 money actually lent. Thus the rescission of the contract cannot affect the consideration mentioned in the mortgage, and the principle enunciated in *Fraser v. Ryan*, 24 A.R. 441, cannot apply.

As to the defendant's second contention, Mr. Beck argued that the \$500 in question was a payment on the contract, and, the contract having been rescinded by the vendor, the \$500 was repayable to the purchaser.

It is not the law that in all cases, upon the rescission of a contract by the vendor, the purchaser is entitled to a return of moneys paid on account of the contract. The conduct of a purchaser, as in this case, may fully justify rescission by the vendor and entitle him to retain moneys paid on account of the contract.

Further, the conduct of the parties, after rescission, may be considered in determining whether a purchaser is entitled to relief from forfeiture of payments made on account. In support of his proposition Mr. Beck relies on *Boyd v. Richards*, 29 O.L.R. 119, 13 D.L.R. 865, and *Steedman v. Drinkle*, [1916] 1 A.C. 275, 25 D.L.R. 420. Those cases do not decide that, under all circumstances, where a vendor rescinds a contract for sale of land, the purchaser is entitled to return of moneys paid on account of the purchase-money, but merely that, where a purchaser is ready and willing to carry out his contract and seeks specific performance, and where the circumstances are such that it would be inequitable to allow the vendor to retain the land and the money, then relief from forfeiture may properly be given. In each of those cases cited by Mr. Beck, the purchaser sought specific performance, and was ready and willing on his part to carry out the contract; but that is not the present case. Here, the purchaser refused to pay the money due under the contract.

He was unable to do so, and made that fact known to the vendor's agent, and abandoned the property and the slight improvements made upon it by him. His inability to carry out the contract was in itself a repudiation of the contract (*Soper v. Arnold* (1889), 14 App. Cas. 429, 435), and justified the vendor in calling upon him to live up to the contract, otherwise it would be rescinded.

The purchaser continuing in default, the vendor, in the exercise of his rights under the contract, rescinded it, but the real cause of rescission was the purchaser's default. Further, the purchaser is not now seeking specific performance, nor is he ready and willing to carry out the contract, but merely insists that he is entitled to repayment of moneys paid by him under the contract, which, because of his default, has come to an end.

I am of opinion that he has no such right. Were it otherwise, a purchaser who repented of his bargain might, by repudiating his contract, bring about a state of affairs that would entitle him to a return of moneys paid under the contract. It is not the policy of the law to encourage people to repudiate their contracts.

The authorities, I think, fully support this view. *Howe v. Smith*, 27 Ch. D. 89, is judicially regarded as a correct exposition of the law on this subject. There the plaintiff purchased certain premises for £12,500, and paid part thereof "as a deposit and in

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part payment of the purchase-money." The contract provided that if the purchaser failed to comply with the agreement the vendor should be at liberty to re-sell the premises, and the deficiency on such second sale should be made good by the defaulter. The purchaser made default, and the vendor warned him that unless the purchase-money was paid he would re-sell. The purchaser, fearing a re-sale, brought action for specific performance. The vendor did re-sell, relying on the purchaser's delay as justifying a rescission of the contract. Mr. Justice Kay held that the plaintiff by his delay was precluded from insisting upon a completion of the contract. On appeal this decision was affirmed, the Court holding that the purchaser by his conduct had repudiated the contract, and therefore could not take advantage of his own default and recover the deposit.

In his judgment, Cotton, L.J., quotes with approval from the judgment of Lord Justice James in *Ex p. Barrell* (1875), L.R. 10 Ch. 512. The purchaser had become bankrupt, and the trustee in bankruptcy disclaimed the contract under which he sought to recover the deposit, and Lord Justice James said (p. 514): "The trustee in this case has no legal or equitable right to recover the deposit. The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refused to perform the contract, and then says, 'Give me back the deposit.' There is no ground for such a claim." Quoting these words, Cotton, L.J., proceeds (27 Ch.D. at p. 95): "The deposit . . . is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit."

In order to entitle the vendor to retain the deposit there must be, according to Cotton, L.J., "acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract." And in the same case Bowen, L.J., at p. 98, says: "The purchaser

cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong."

In *Hall v. Burnell*, [1911] 2 Ch. 551, the plaintiff agreed to sell and the defendant to buy certain lands, the agreement providing that the purchaser should pay the vendor's solicitors a deposit of £50, and this was done. There was no provision in the contract as to retention of the deposit by the vendor in the event of the purchaser making default, and it was held, following *Howe v. Smith (ante)*, that the vendor was entitled to retain the deposit.

In *Sprague v. Booth*, [1909] A.C. 576, \$250,000 had been paid as a deposit as security for the performance of a contract to purchase railway stock. The purchaser made default, refused to carry out the contract, and assigned his rights to the plaintiff, who brought the action to recover the deposit, and it was held, following *Howe v. Smith (ante)*, that he was not entitled to relief.

Stickney v. Keeble, [1915] A.C. 386, was an action by a purchaser of lands to recover a deposit. The vendor was guilty of unreasonable delay in completing the purchase, and the purchaser served upon him a notice limiting the time at the expiration of which he would treat the contract as at an end. The vendor did not complete the contract within the named time; and, purporting to treat the purchaser's conduct as a repudiation of the contract, sold and conveyed the property to a third person. Thereupon the purchaser brought action to recover the deposit, and it was held that he was entitled to its return, Lord Atkinson saying (p. 411): "It would, in my view, be quite unjust to allow the respondents to retain the money deposited as a guarantee for the due performance of the very contract which they themselves, not the depositor, have failed to perform. As in *Howe v. Smith*, 27 Ch. D. 89, the purchaser who was in default could not get back his deposit because of his default, so here the vendors, who are in default, should not be permitted to retain the deposit since they are in default."

Brickles v. Snell, [1916] 2 A.C. 599, 30 D.L.R. 31, was a contract for the purchase of land. The contract provided for its completion on a named day, but the purchaser made default because of the sudden illness of his solicitor. He then brought action for specific performance, but omitted to ask for alternative

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relief, for a return of the deposit paid. Specific performance was refused because of the purchaser's default, the vendor having been able and willing on his part to carry out the contract; but Lord Atkinson, who delivered the judgment of the Judicial Committee, expressed regret that there had not been a claim for a return of the deposit. Unlike the present case, the plaintiff in *Brickles v. Snell* asked for specific performance.

In *Soper v. Arnold* (*ante*), the purchaser was unable to provide the money to complete the purchase within the time fixed by the contract, and the vendor rescinded. Thereupon the purchaser brought an action to recover his deposit, but it was dismissed, Lord Herschell saying (p. 434): "It seems to me that he (the purchaser) was in default, that the contract went off owing to his default, and that under those circumstances he cannot recover the deposit."

In the present case the rescission of the contract was caused by the default of the defendant. He is not, therefore, entitled to profit by his default by recovering the \$500 in question, and this appeal should be dismissed with costs.

CLUTE, SUTHERLAND, and KELLY, JJ., agreed with MULOCK, C.J. Ex.

RIDDELL, J.:—The defendant Stephens was the owner of a number of lots on Yonge street, and in December, 1914, made an agreement to sell them to the defendant Willaughan for \$2,000—\$500 down and the remainder in instalments. In the agreement there was a provision that in case the purchaser failed to pay an instalment the vendor might cancel the agreement, the purchaser on such cancellation having no right to damages or the return of any money paid.

The purchaser did not have the necessary amount to make the down-payment, but he had the equity of redemption in certain lands mortgaged by him to the plaintiff. He borrowed a sum of \$200 from the vendor, and gave a second mortgage for the sum of \$700 upon the land last named, to the vendor, to cover the down-payment of \$500 and the \$200 borrowed.

Making default on his first mortgage, he was proceeded against on it in the County Court of the County of York; the accounts

were referred to the Clerk, and Stephens was made a party as a subsequent incumbrancer. In the Clerk's office it was contended that Stephens could prove for the \$200 only; the Clerk found against this contention, and his decision was sustained by the County Court Judge. This is an appeal from that decision.

The case has been treated, no doubt rightly, as though the purchaser had paid the \$500 to the vendor (Equity looks upon that as done which should be done); and was now suing to recover it back.

It is necessary to set out more fully the facts:—

After the execution of the agreement, the purchaser went into possession of the land and built a one-room "shack," in which he lived for a year; he also seems to have moved a fence and to have ploughed the land. He says himself that he "fenced five acres and put up two shacks." He never paid any further sum on his purchase; but, several times after the lapse of the year, he said he could not keep the land and make any payments; he said "he left the place and could not make the payments."

Thereupon the vendor gave a formal notice of cancellation; the purchaser by his counsel says: "We do not want the land;" there never was any tender or offer to pay, and the purchaser does not desire to carry out his contract.

Very many cases were cited to us not unlike the present in some particulars, in which such a provision as we have in this case, has been called a penalty and has been relieved against at the instance of a purchaser; but it has been relieved against in order to allow the purchaser who was willing and able to carry out his contract (except in the matter of time) to do so on proper terms. It is unnecessary to enumerate these cases—the most important and authoritative is *Kilmer v. British Columbia Orchard Lands Limited*, [1913] A.C. 319, 10 D.L.R. 172. I add to those cited in the argument only *In re Dagenham (Thames) Dock Co.* (1873), L.R. 8 Ch. 1022.

The part payment might be recovered back (on proper terms) if specific performance were refused: the latest case of this kind in the Judicial Committee is *Steedman v. Drinkle*, [1916] 1 A.C. 275, 25 D.L.R. 420; and that this is the law is indicated in *Brickles v. Snell*, [1916] 2 A.C. 599, at p. 604, 30 D.L.R. 31. The case of *Labelle v. O'Connor*, 15 O.L.R. 519, is to the same effect.

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But there is no case in which one who is unable to carry out his contract has been allowed to abandon his purchase and claim the return of his part payments, when the vendor has given formal notice of cancellation. In the language of Kekewich, J., "that would be to enable him to do the very thing that Lord Justice Bowen said he ought not to be allowed to do, namely, take advantage of his own wrong—I mean wrong, not in the moral sense, but in the sense that he could not perform his contract:" *Soper v. Arnold* (1887), 35 Ch. D. 384, at p. 390.

In *Phillips v. Greater Ottawa Development Co.* (1916), 38 O.L. 315, 33 D.L.R. 259, the judgment of the majority of the Court went solely on the ground of the infancy of the purchaser, which made the contract void *ab initio*.

I would dismiss the appeal with costs.

Appeal dismissed.

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Mar. 25.

[APPELLATE DIVISION.]

RE BAGSHAW AND O'CONNOR.

Landlord and Tenant—Lease under Short Forms of Leases Act—Default in Payment of Rent—Termination of Lease by Oral Agreement—Surrender—Refusal to Give up Possession—Institution of Summary Proceedings for Recovery of Possession—Landlord and Tenant Act, Part III.—Overholding Tenant—Rent Overdue for 15 days—Right of Re-entry—Short Forms of Leases Act, schedule B., No. 12—Landlord and Tenant Act, sec. 19—Tender of Amount of Rent Overdue—Effect of—Independent Right of Re-entry not Waived by Acceptance of Rent in Arrear—Equitable Relief from Forfeiture—Powers of County Court Judge in Summary Proceedings—Power of Court under sec. 78 (2) of Landlord and Tenant Act—Conduct of Tenant.

By a lease made in 1916, in pursuance of the Short Forms of Leases Act, B. demised land to O. for five years, at a rental of \$100 a month, payable on the first day of each month of the term. On the 22nd July, 1917, two months' rent being in arrear, B. and O. met, and, according to B.'s story, O. agreed to give up possession on the 10th August. O. said that he agreed to give up possession only in the event of a sale. B. rented the premises to another man. O. refused to vacate, and on the 25th July tendered the amount of rent in arrear, which was refused. B., on the 13th August, instituted summary proceedings under Part III. of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, and obtained from the Judge of the County Court an order for a writ of possession, from which O. appealed:—
Held, that the lease had not been terminated by agreement between the parties: the agreement, if made, rested in parol, and could not operate as a surrender of the lease; O. did not give up possession, and there was no surrender by operation of law.

(2) The institution of the summary proceedings was an unequivocal exercise of the lessor's option to determine the lease, exercising his right of re-entry for non-payment of rent overdue for 15 days: Short Forms of Leases Act, R.S.O. 1914, ch. 116, sched. B., No. 12; Landlord and Tenant Act, sec. 19.

- (3) The tender was in respect of rent overdue prior to the forfeiture, and its acceptance would not have operated as a waiver of the right of re-entry: acceptance of rent is not an affirmation of the continuance of the relations of landlord and tenant; the right to recover the arrears of rent and the right of re-entry are not alternative but independent rights.
 - (4) It was not open to the County Court Judge, acting under the provisions of Part III. of the Landlord and Tenant Act, to consider whether the tenant was entitled to equitable relief from forfeiture: if the tenant desired equitable relief, he must seek it in the manner provided by sec. 20, by bringing an independent action or by an application to the Court in any action brought by the lessor to enforce his right of re-entry.
 - (5) The Divisional Court hearing the appeal is entitled, under sec. 78 (2), if of opinion that the right to possession should not be determined summarily, to discharge the order of the Judge, and leave the landlord to his action for recovery of possession; but the conduct of the tenant was not such as to induce the Court to give him an opportunity of obtaining relief from the forfeiture.
- The order of the County Court Judge was, therefore, affirmed.

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THE following statement of the facts is taken from the judgment of MULOCK, C.J. Ex.:—

This is an appeal by Albert O'Connor, the tenant, from the order of His Honour Judge Hartman, Judge of the District Court of the District of Temiskaming, made under sec. 77 of the Landlord and Tenant Act, being R.S.O. 1914, ch. 155, directing the issue of a writ of possession in favour of George Albert Bagshaw, the landlord, to put him in possession of the premises demised by Bagshaw to O'Connor, by lease bearing date the 16th September, 1916. By this lease, made in pursuance of the Short Forms of Leases Act, Bagshaw demised to O'Connor the premises in question for the term of five years, to be computed from the 1st November, 1916, at a monthly rental of \$100, payable on the first day of each month, in advance, the first of such payments to be made on the 1st November, 1916.

The proviso in the lease for re-entry is in the following words:—

“Proviso for re-entry by the said lessor on non-payment or non-performance of covenants.” (See the Short Forms of Leases Act, R.S.O. 1914, ch. 116, schedule B., No. 12.)

O'Connor entered into possession under the lease, and at his own expense made certain improvements.

In March, 1917, it was agreed between the parties that these improvements should be treated as satisfaction of the rent until the end of May, 1917, and that O'Connor should, on the 1st June, 1917, and on the first day of each month thereafter, pay rent in accordance with the terms of the lease.

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On the 31st May, 1917, O'Connor wrote Bagshaw as follows:—
"Schumacher, Ont., May 31st, 1917.

"Mr. G. A. Bagshaw.

"Dear Sir:—Business has gone very bad here in the last month. All the young unmarried men has left the camp and what few has remained at the mines are staying at the McIntyre Club, also the Schumacher Club, and for the foreigners they have nearly all got homes of their own. I have not rented one room by the month in over a month now. There is nothing but strike talk going on and I guess by June 16th they all intend to come out. Dome and Hollinger will close down and for the others they will have to. I am not taking in enough money here to pay the running expenses of the house and to pay my grocery bill. Also the cess-pool has now overflowed enough to raise the water 2 feet under this house and is also running into the boiler room under the store, and I did not want to put on any unnecessary expense just now until we see what things will do. The McIntyre are housing their men for nothing and going to feed them for 75c. per day. I know a man whom they have out trying to get them in Sudbury and Toronto. I never saw a place take such a change in such a short time. Can you come up here and see what we can do? I don't know what to suggest myself. In case a strike is pulled off, do you want me to remain here or not? Let me know what you think of the situation at once for something will have to be done. Trusting to here from you by return of mail, I am,

"Yours truly,

"Albert O'Connor."

To this letter Bagshaw sent the following reply:—

"Haileybury, Ont., June 5th, '7.

"Albert O'Connor, Esq., Schumacher, Ont.

"Dear Sir:—On my return home yesterday I found your letter of May 31st. I cannot say at this date, just when I will be able to get north. In the meantime, I have of course a general understanding of the situation as it exists in Porcupine, and I do not wish to do anything at all unfair under the circumstances. However, you plug along and do your best until I am able to get up and look the situation over. Of course you have lived in this mining country long enough to realise that these spells come once in a while, but things invariably recover, as doubtless they will in this instance, and when they do, they will probably be better than

ever. I will let you know as soon as I am able when you may expect me up and you might let me know from time to time how things are going."

On the 3rd July, Bagshaw wrote O'Connor as follows:—

"Dear Sir:—I have been trying to get my affairs so arranged as to enable me to go north for some time, but have simply been unable to do so, nor do I see any immediate likelihood of being able to do so. It is, however, very plainly apparent that the situation you were suffering under, when last you wrote me, has been much improved, and I hope you are beginning to feel the benefit of it. It will surely come you know; as your past experience I am sure tells you, 'Good times' always follow bad, and all camps have their ups and downs, and when they get good again, you should do well. In the meantime, not having heard from you, I have been giving our present situation some thought. I want to be fair all round, but I have a lot of cash invested, and taxes and insurance don't fail to go on week days and Sundays. I think, therefore, that it is about time I saw some return, and would ask you to let me hear from you enclosing your cheque for \$100.00, which you may regard as payment in full of rent for the months of June and July. On August 1st, I will expect our original arrangement carried out, viz., \$100.00 each month in advance."

On the 7th July, 1917, O'Connor wrote to Bagshaw as follows:—

"Dear Sir:—Your letter of recent date received and noted. Business is getting worse here instead of better. I was in hopes you could come up. I was trying to get you by 'phone last night and this morning to see if you could not take a run up to see the situation for yourself. This house is no good in this town. There is only one thing to do to save the situation, is to move it to Timmins, which can be done for an outlay of from \$1,200 to \$1,500. So if you could come up here I will go into all details with you and shew you where we can save ourselves. If you will not move it to Timmins, I would not give \$100 rent for six months' rent and you heat and light it for me. If you can come up here do so. I may be in Haileybury in the course of a couple of weeks, and I will call and explain everything to you. Sorry things are going so badly for us both, but it can't be helped.

"Yours truly,

"Albert O'Connor."

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On the 22nd July, Bagshaw, who lived at Haileybury, had an interview with O'Connor at his residence in Schumacher, when O'Connor urged the removal of the building to Timmins. This Bagshaw refused to do, and his evidence is to the effect that O'Connor agreed to give up possession on the 10th August.

The substance of O'Connor's evidence is, that he only agreed to give up possession in event of a sale. Bagshaw understood that it was an unconditional promise; and on the next day he leased the premises to one Meyers, and so notified O'Connor's wife. On the same day O'Connor learned from his wife of the lease to Meyers, and saw Bagshaw. At the trial he swore that he asked Bagshaw: "Are you making some negotiations with Meyers to rent the premises?" He says, 'I have them rented.' I says, 'I am not moving out of there on the 10th August.'" He swore that again on the 24th July he saw Bagshaw and said: "'I don't believe you have rented that place to Meyers.' He says: 'I have accepted money and gave him a receipt. I have a letter from Meyers.' I said, 'I am not going to vacate on the 10th of August.'" Then O'Connor offered his cheque for \$200 in payment of the two months' rent in arrears, which Bagshaw refused to accept.

On the following day, O'Connor's solicitor tendered \$201.25 in payment of the arrears and interest, which Bagshaw also declined to accept.

On the 13th August, the learned Judge, on the application of Bagshaw, under the provisions of sec. 75 of R.S.O. 1914, ch. 155, appointed in writing a time and place to inquire into and determine whether O'Connor was a tenant to Bagshaw for a term which had been determined by default in payment of rent or by agreement, and whether he held possession of the premises in question against the right of Bagshaw, and whether he wrongfully refused to go out of possession, having no right to continue in possession; and, after evidence and argument, the learned Judge made the order declaring that Bagshaw was entitled to possession, and directed the issue of a writ of possession.*

*The following provisions of Part III. (Overholding Tenants) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, are material:—

75.—(1) Where a tenant after his lease or right of occupation, whether created by writing or by parol, has expired or been determined, either by the

February 12. The appeal was heard by MULOCK, C.J.Ex., BRITTON, CLUTE, SUTHERLAND, and KELLY, JJ.

Erichsen Brown, for the appellant. The landlord contends that the tenancy was determined by non-payment of rent. But the appellant's tender of the overdue rent entitles him to relief against forfeiture. As to the respondent's other contention, that the lease was determined by agreement of the parties, if there was an agreement, it was not in writing, and so cannot operate as a surrender of a lease: *Doe d. Murrell v. Milward* (1838), 3 M. & W. 327; *Cobb v. Stokes* (1807), 8 East 358; *Johnstone v. Hudlestone* (1825), 4 B. & C. 922; Halsbury's Laws of England, vol. 18, p. 548, para. 1060; *Grimman v. Legge* (1828), 8 B. & C. 324. As O'Connor did not give up possession, there was no surrender by operation of law: *Coupland v. Maynard* (1810), 12 East 134; *Re Clancy and*

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landlord or by the tenant, by a notice to quit or notice pursuant to a proviso in any lease or agreement in that behalf, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses or neglects to go out of possession of the land demised to him, or which he has been permitted to occupy, his landlord may apply upon affidavit to the Judge of the County or District Court of the county or district in which the land lies to make the inquiry hereinafter provided for.

(2) The Judge shall in writing appoint a time and place at which he will inquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired or has been determined by a notice to quit or for default in payment of rent or otherwise, and whether the tenant holds the possession against the right of the landlord, and whether the tenant, having no right to continue in possession, wrongfully refuses to go out of possession.

(3) Notice in writing of the time and place appointed, stating briefly the principal facts alleged by the complainant as entitling him to possession, shall be served upon the tenant or left at his place of abode at least three days before the day so appointed . . . to which notice shall be annexed a copy of the Judge's appointment and of the affidavit on which it was obtained, and of the documents to be used upon the application.

77.—(1) If, at the time and place appointed, the tenant fails to appear, the Judge, if it appears to him that the tenant wrongfully holds against the right of the landlord, may order a writ of possession, Form 3, directed to the sheriff of the county or district in which the land lies to be issued commanding him forthwith to place the landlord in possession of the land.

(2) If the tenant appears the Judge shall, in a summary manner, hear the parties and their witnesses, and examine into the matter, and if it appears to the Judge that the tenant wrongfully holds against the right of the landlord he may order the issue of the writ.

78.—(1) An appeal shall lie to a Divisional Court from the order of the Judge granting or refusing a writ of possession. . . .

(2) If the Divisional Court is of opinion that the right to possession should not be determined in a proceeding under this Part the Court may discharge the order of the Judge, and the landlord may in that case proceed by action for the recovery of possession.

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Schermehorn (1914), 31 O.L.R. 435. This is not a case for summary application under the Act: *Re Snure and Davis* (1902), 4 O.L.R. 82, at p. 86; *Re Grant and Robertson* (1904), 8 O.L.R. 297; *Re Dickson Co. of Peterborough and Graham* (1912), 27 O.L.R. 239, at p. 242; *Re Mitchell and Fraser* (1917), 40 O.L.R. 389, 38 D.L.R. 597; R.S.O. 1914, ch. 155, sec. 75 (3).

J. M. Ferguson, for the landlord, respondent. The term came to an end by non-payment of rent; and forfeiture took place automatically under the Act: R.S.O. 1914, ch. 155, sec. 19. The agreement between the parties determined the lease: R.S.O. 1914, ch. 116, Short Forms of Leases Act, schedule B., No. 12. There was surrender by operation of law: *Woodfall's Landlord and Tenant*, 19th ed., p. 348; *Fenner v. Blake*, [1900] 1 Q.B. 426. Considering the conduct of the tenant, he is not entitled to relief: *Hyman v. Rose*, [1912] A.C. 623, at p. 630; *Curry v. Pennock* (1913), 4 O.W.N. 712, 1065. The application under the Act was the proper practice.

Brown, in reply, referred to *Smith's Leading Cases*, 12th ed., vol. 2, p. 882; *Lyon v. Reed* (1844), 13 M. & W. 285; and *Maddison v. Alderson* (1883), 8 App. Cas. 467, 473.

March 25. The judgment of the Court was read by MULOCK, C.J.Ex. (after stating the facts as above):—Two grounds are advanced in support of the contention that the term had come to an end, namely: default in payment of rent; and agreement between the parties to determine the lease.

As to the second ground, the agreement, if made, rested in parol, and therefore cannot operate as a surrender of the lease: *Johnstone v. Hudlestone*, 4 B. & C. 922; *Doe d. Murrell v. Milward*, 3 M. & W. 327. Further, O'Connor did not give up possession; thus there was no surrender by operation of law: *Coupland v. Maynard*, 12 East 134. Accordingly the second ground fails.

As to the first ground, O'Connor contends that his tender of the overdue rent relieved him from Bagshaw's right to forfeit the lease. The statutory meaning of the proviso, contained in the lease, for re-entry for non-payment of rent is to the effect that, whenever any rent reserved by the lease remains unpaid for 15 days after it should have been paid, the lessor may re-enter and repossess himself of the demised premises as of his former estate

(see the Short Forms of Leases Act, R.S.O. 1914, ch. 116, schedule B., No. 12); it not having been otherwise agreed, the same right is given the lessor by R.S.O. 1914, ch. 155, sec. 19.*

O'Connor made default in payment of the month's rent due on the 1st June, and on the 16th June Bagshaw became entitled to re-enter. Again, a new right accrued to him on the 16th July in respect of the month's rent due on the 1st July and remaining unpaid, and on and after the 16th July Bagshaw became entitled to elect whether he would or would not exercise his right to repossess himself of the demised premises as provided in the lease. This may be effected either by taking physical possession or by acquiring possession by means of some possessory action or proceeding. The bringing of an action in ejectment is equivalent to the ancient re-entry, and is an unequivocal exercise of the lessor's election to determine the lease: *Jones v. Carter* (1846), 15 M. & W. 718; *Serjeant v. Nash Field & Co.*, [1903] 2 K.B. 304, 310; *Grimwood v. Moss* (1872), L.R. 7 C.P. 360.

Possession is the only relief granted in ejectment, and the only relief that may be granted by an order made under sec. 77 of ch. 155; and therefore it follows that the institution of the summary proceedings here taken under that section was an unequivocal exercise of the lessor's option to determine the lease, and that it so operated unless the tender of rent above referred to deprived Bagshaw of his right to forfeit.

The right to elect to determine the lease created by the contract in the lease is a legal one; and, unless relieved against or defeated by some act such as release, abandonment, or waiver, may be exercised until barred by the Statute of Limitations: *Matthews v. Smallwood*, [1910] 1 Ch. 777, 786. The tenant has not the option of depriving the landlord of this right by some act on his part, as, for example, by tender or payment of the rent remaining due after the landlord became entitled to the right to forfeit.

Green's Case (1582), 1 Cro. Eliz. 3, is in point. "The case was, a prebend let land to Green for years, rendering rent, and a re-

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*19.—(1) In every demise, whether by parol or in writing and whenever made, unless it is otherwise agreed, there shall be deemed to be included an agreement that if the rent reserved, or any part thereof, shall remain unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand thereof shall have been made, it shall be lawful for the landlord at any time thereafter, into and upon the demised premises, or any part thereof in the name of the whole, to re-enter and the same to have again, repossess and enjoy as of his former estate.

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entry for non-payment. The rent was demanded and was not paid, and two days after the lessor received the rent of him, and maketh him an acquittance by the name of his fermor: and if this receipt doth bar him of his re-entry, was the question. And it was clearly resolved that the bare receipt of the rent after the day was no bar, for it was a duty due to him."

In *Price v. Worwood* (1859), 4 H. & N. 512, ejectment was brought by the landlord against a tenant for breach of covenant to insure. After the breach the landlord accepted from a sub-tenant money on account of arrears of rent overdue by the tenant to the plaintiff. Held, *per* Martin, B. (p. 516): "A receipt of rent, to operate as a waiver of a forfeiture, must be a receipt of rent due on a day after the forfeiture was incurred. The mere receipt of the money, the rent having become due previously, is of no consequence, and for the very plain reason that the entry for a condition broken does not at all affect the right to receive payment of a pre-existing debt."

In *Ward v. Day* (1863), 4 B. & S. 337, at pp. 352, 353, which was an action for arrears of rent and other relief, Crompton, J., says: "Waiver by receipt of rent only applies to rent accruing subsequent to the forfeiture. . . . There is no inconsistency in a man who has been given notice to determine a tenancy receiving rent due before the supposed determination of it, and consequently there is no waiver by receiving that rent." In the same case Blackburn, J., says (p. 358): "The receipt of rent accrued due before the forfeiture is no waiver." And at pp. 359, 360: "As to the supposed effect of a tender, . . . I take it that a tender has the same effect as payment. . . . Suppose there had been a distinct tender of the rent due on the 25th of December, it might have operated as payment; but payment of that sum would not have prevented the plaintiff's right to recover."

In the present case, on the 25th July a tender was made of the two months' rent due, one on the 1st June, the other on the 1st July. On the 16th June, and again on the 16th July, the landlord had a right to re-enter. Thus the tender was in respect of rent overdue prior to the forfeiture, and its acceptance would not operate as a waiver of the right of re-entry. It follows in this case that, when the rent remained overdue for fifteen days, Bagshaw was entitled to two rights: one to recover the arrears of rent, and

the other to re-enter if he elected to exercise it. This latter right he derived in two ways, namely, from R.S.O. 1914, ch. 155, sec. 19, and from the effect given by the Short Forms of Leases Act to the short form of the proviso for re-entry. Acceptance of rent is not, like distraining, an affirmation of the continuance of the relations of landlord and tenant. The two rights are not alternative but independent rights. The satisfaction of one does not satisfy the other.

When the case came before the learned Judge, it became his duty to inquire and determine whether O'Connor was tenant for a term which had been determined by default in payment of rent, and whether he held possession against the right of the landlord, and whether the tenant, having no right to continue in possession, wrongfully refused to go out of possession; and, if it appeared to the Judge that O'Connor wrongfully held against the landlord's right, then it was his duty to order a writ of possession. Beyond question the facts shew the tenancy, the determination of the lease by default in payment of rent, the holding possession against the landlord's right, the absence of any right in the tenant to retain possession, and his wrongful refusal to go out of possession. On these facts the learned Judge properly made the order complained of, the only order which, under the circumstances, he had the right to make. It was not open to him to consider whether the tenant was entitled to equitable relief from forfeiture. The scope of the inquiry is limited by sec. 75 of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, to the matters enumerated in that section. If the tenant desires equitable relief, he must seek it in the manner provided by sec. 20, either by bringing an independent action or by an application to the Court in the lessor's action to enforce his rights of re-entry: *Lock v. Pearce*, [1893] 2 Ch. 271.

By sec. 78, an appeal lies to a Divisional Court from the order in question; and, if the Court is of opinion that the right of possession should not be determined under the provisions of that Act, it may discharge the order and leave the landlord to his remedy by action. I see no reason for thinking that Bagshaw's right of possession should not have been determined in the summary proceedings in question. His right of possession admits of no doubt, and O'Connor's conduct is open to strong disapproval. For a sinister purpose he made false statements to Bagshaw; and

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the latter, moved by them, made a voluntary and a generous offer, namely, to accept \$100 in payment of the \$200 overdue rent. To this offer O'Connor replied, saying; "This house is no good in this town. There is only one thing to do to save the situation, is to move it to Timmins, which can be done for an outlay of from \$1,200 to \$1,500. . . . If you will not move it to Timmins, I would not give \$100 rent for six months' rent and you heat and light it for me. . . . Sorry things are going so badly for us both, but it can't be helped."

In consequence of this letter, Bagshaw, on the 21st July, went to Schumacher, and on the following day saw O'Connor, when they discussed the matter. At this interview O'Connor again urged the removal of the house to Timmins, stating that the house at Schumacher was absolutely useless to him; and, when Bagshaw refused to remove it, O'Connor asked Bagshaw what he would do with the place, and the latter said he would do what was best, and it was finally agreed between them that O'Connor would vacate the premises on the 10th August.

Relying on this agreement, Bagshaw demised the premises to one Meyers for a term commencing on the 10th August. O'Connor, on learning of the lease to Meyers, refused to vacate, saying that his promise to do so was conditional on Bagshaw selling, not leasing.

O'Connor on his examination admitted the falsity of some of the statements in his letters to Bagshaw, and it is apparent that he is not a credible witness. I am satisfied that he agreed to vacate the premises on the 10th August unconditionally. His repudiation of such promise is an act of bad faith, which should bar him from obtaining equitable relief from forfeiture of his lease.

I therefore see no ground for disturbing the learned Judge's order, and think this appeal should be dismissed with costs.

Appeal dismissed with costs.

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Mar. 25.

STEWART V. STERLING.

Slander—Imputing Unchastity to Young Girl—Damages—Failure to Prove Special Damage—Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 19 (1)—Evidence of Illness and Loss of Hospitality—Insufficiency—Repetition of Slander—Nominal Damages—Costs—Appeal—Misconduct of Defendant.

In an action (brought in a County Court) for a slander imputing to the plaintiff, a young girl, unchastity, "meaning thereby that the said plaintiff was a girl of unchaste character," the jury found a verdict for the plaintiff for \$500, and judgment for that sum and costs was given in favour of the plaintiff:—*Held*, upon appeal, that, no special damage having been proved, only nominal damages could be recovered: Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 19 (1).

Whilling v. Fleming (1908), 16 O.L.R. 263, approved.

After verdict, where the proof is sufficient to connect the plaintiff with a charge imputing a crime, proof of special damage is not necessary; but here the plaintiff could not avail herself of the imputation of a crime with which she was not charged.

Where special damage is alleged, it must be strictly proved; and it could not be said that it was proved that the plaintiff had become ill from the effects of the slander: if illness or loss of hospitality was caused by reason of the slander, it was by the repetition thereof, for which the defendant was not responsible. Special damage from repetition is too remote. Each publication is a distinct tort, and every person repeating the slander becomes an independent slanderer. The plaintiff did not come within either of the two exceptions stated in *Odgers on Libel and Slander*, 5th ed. (Can. notes), p. 177. It did not appear that the plaintiff was present when the slander was uttered, and it was not uttered in the presence of any person immediately concerned and under moral obligation to repeat it; nor could it be said that the defendants requested those to whom he spoke, or intended or desired them, to repeat the slander.

Moreover, the evidence did not support the allegation of loss of hospitality: it did not shew that the plaintiff's friends had refused to receive her—rather that her knowledge that the slander had been uttered made her diffident of visiting her friends.

Review of the authorities.

The damages were reduced to nominal damages, but the plaintiff was allowed her full costs in the County Court, without set-off; and the defendant, although successful upon the appeal, was allowed no costs of it, because of his misconduct in making a groundless attack upon the plaintiff's character.

APPEAL by the defendant Alexander Sterling from the judgment of the Senior Judge of the County Court of the County of Huron, upon the verdict of a jury, in favour of the plaintiff as against the appellant for the recovery of \$500 damages and taxed costs, in an action for slander.

February 13. The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and KELLY, JJ.

C. Garrow, for the appellant, argued that no special damage had been proved, and so only nominal damages could be awarded:

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Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 19 (1); *Whitling v. Fleming* (1908), 16 O.L.R. 263. Any special damage must be strictly proved: *Allsop v. Allsop* (1860), 5 H. & N. 534; *Lynch v. Knight* (1861), 9 H.L.C. 577; *Wilkinson v. Downton*, [1897] 2 Q.B. 57. Loss of the society of friends is not enough: loss of hospitality must be proved: Halsbury's Laws of England, vol. 10, p. 324. The defendant was not responsible for the repetition of his remarks: Odgers on Libel and Slander, 5th ed. (Can. notes), p. 177. It was not shewn that the plaintiff's illness was the natural result of the slander.

L. E. Dancey, for the plaintiff, respondent, urged that this was a common law action. The words used implied a criminal act: Criminal Code, sec. 304. There was therefore no necessity of pleading or proving special damage. Exemplary damages could be recovered without proving special damage: *Gamble v. Hirschfield* (1894), 26 N.S.R. 468. But, if special damage must be proved, this had been done. The plaintiff had become ill as a result of the slander. Also the loss of hospitality had been shewn: *Davies v. Solomon* (1871), L.R. 7 Q.B. 112. On the question of innuendo, counsel cited *Goldstein v. Foss* (1826), 2 C. & P. 252; *Paladino v. Gustin* (1897), 17 P.R. 553; *Duval v. O'Beirne* (1912), 3 O.W.N. 513, 1 D.L.R. 78.

Garrow, in reply, said that it was necessary now to plead the Libel and Slander Act. There was no innuendo of a criminal charge. The innuendo was that the plaintiff was a girl of unchaste character. The words do not impute a crime to her.

March 25. CLUTE, J.:—Appeal from the judgment of the Senior Judge of the County Court of the County of Huron, pronounced on the 14th September, 1917, upon the verdict and findings of the jury, for the plaintiff for \$500.

The action is for a slander imputing to the infant plaintiff unchastity, "meaning thereby that the said plaintiff was a girl of unchaste character." The defendant, besides denying that he had spoken the words, also denied the innuendo. During the trial the plaintiff was allowed to amend by pleading special damage.

The Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 19, subsec. (1), provides that in an action for slander for defamatory words spoken of a woman imputing unchastity, it shall not be

necessary to allege or prove that special damage resulted to the plaintiff from the utterance of such words, and the plaintiff may recover nominal damages without averment or proof of special damage. No special damage was proven in this case; and, in the absence of such averment and proof, only nominal damages can be recovered: *Whitling v. Fleming*, 16 O.L.R. 263.

The words in the statement of claim, as proven, raised an implication that a criminal offence had been committed, but not necessarily that the plaintiff was a party to the crime, nor was it alleged in the pleading or innuendo that a crime had been committed. After verdict, where the proof is sufficient to connect the plaintiff with a charge imputing a crime, proof of special damage is not necessary; but in the present case the plaintiff cannot avail herself of the imputation of a crime with which she is not charged.

The portion of the slander imputing a crime is that "Walters had paid Dr. — \$300 to get her (meaning the plaintiff) all right." There was no allegation that anything was done in pursuance of this payment to the doctor.

It was strongly argued by Mr. Dancey that the effect of the slander was that she became ill from the effects of it; but, if illness was caused by reason of the slander, it was by repetition thereof, for which the defendant was not responsible. A husband cannot maintain an action for the loss of his wife's services caused by illness or mental depression from defamatory words not actionable *per se* being spoken of her: *Odgers on Libel and Slander*, 5th ed. (Can. notes), p. 382. Special damage must be strictly proved at the trial where the words are not actionable *per se*. The plaintiff will be confined to the special damage alleged, but the present right of action, without special damage, is limited to nominal damages. It is, therefore, still necessary in an action like the present, where special damage is claimed, that it should be strictly proven: *Allsop v. Allsop*, 5 H. & N. 534, affirmed in *Lynch v. Knight*, 9 H.L.C. 577.

In the last case it is said that the loss by the wife of maintenance by the husband, occasioned by slander uttered by a third person, may be the subject of a claim for damages, but such loss cannot be presumed to have so arisen: it must be distinctly averred.

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In *Wilkinson v. Downton*, [1897] 2 Q.B. 57, these cases are considered by Wright, J., who sustained a verdict for £100 because of injury to a married woman by being told (as a joke) that her husband had met with a serious accident whereby both his legs were broken. The plaintiff believed it to be true, and in consequence suffered a violent nervous shock, which rendered her ill. It will be noticed that the wife suffered the shock from the statement having been made to her personally by the defendant.

It was further urged by the plaintiff's counsel that there was sufficient evidence of loss of hospitality to support the claim for special damage; and in *Davies v. Solomon*, L.R. 7 Q.B. 112, it was held that the loss of hospitality of friends was the reasonable and natural consequence of the slander, and a loss to the wife herself for benefits which her husband was not bound to bestow upon her, and that such loss of hospitality was special damage which would support an action by husband and wife.

In the present case the evidence put forward to support the claim of loss of hospitality does not go far enough. It was to the effect that the plaintiff "could not go to the Smiths, friends of ours, on account of this scandal." It did not allege that her friends would not receive her or that she lost their hospitality by reason of the slander. For all that appears, it may have been her own diffidence in visiting her friends, and not their refusal to receive her, that caused the loss of such hospitality. Indeed this is the most natural implication from the evidence. It falls short of that definite proof necessary to support a claim for special damage. A person is responsible only for the utterance by himself of a slander, and not for its repetition, and special damage from such repetition is too remote. Each publication is a distinct tort, and every person repeating it becomes an independent slanderer, and he alone is responsible for his unlawful act: *Odgers on Libel and Slander*, 5th ed. (Can. notes), p. 177. The learned author points out (at p. 178) two apparent exceptions to this rule:—

"(1) Where, by communicating a slander to A., the defendant puts A. under a moral obligation to repeat it to some other person immediately concerned; here, if the defendant knew the relation in which A. stood to this other person, he will be taken to have contemplated this result when he spoke to A. In fact, here A.'s repetition is the natural and necessary consequence of the defend-

ant's communication to A. (See the judgment of Lopes, L.J., in *Speight v. Gosnay* (1891), 60 L.J. Q.B. 231.)

"(2) Where there is evidence that the defendant, though he spoke only to A., intended and desired that A. should repeat his words, or expressly requested him to do so; here the defendant is liable for all the consequences of A.'s repetition of the slander; for A. thus becomes the agent of the defendant."

This passage was cited with approval by the Court in *Whitney v. Moignard* (1890), 24 Q.B.D. 630, at p. 631.

In the *Speight* case the imputation of unchastity was uttered in the presence of the plaintiff's mother, who repeated it to the plaintiff, who repeated it to the man to whom she was engaged to be married. There was no evidence that the defendant authorised or intended the repetition. Held, an action of slander could not be maintained.

In *Derry v. Handley* (1867), 16 L.T.R. 263, H. told W. that the plaintiff, his wife's dressmaker, was a woman of immoral character. W. naturally informed his wife, and she ceased to employ the plaintiff. Held, that the plaintiff's loss of Mrs. W.'s custom was the natural and necessary consequence of the defendant's communication to W.

In the present case it does not appear that the plaintiff was present when the slander was uttered, nor was it uttered in the presence of her father or mother or other person immediately concerned and under moral obligation to repeat it, so that her illness, if caused, as it probably was, from hearing the slander by repetition, is not brought within the exception so as to make the defendant responsible for special damage, even admitting that the special damage of sickness was of such a nature as to entitle her to recover, under the authority of *Wilkinson v. Downton*, *supra*.

In the *Whitney* case, a paragraph in the statement of claim in an action for a libel published in a newspaper stated that the defendant knew that the words published would be, and the same in effect were, repeated and published in other editions of the same newspaper. Held, that evidence of the facts stated in this paragraph would be admissible at the trial, and therefore the paragraph was properly pleaded and ought not to be struck out. Huddleston, B., quotes the language given by Odgers on Libel and Slander, above quoted, and says: "It seems to me that the proposition

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cannot be better put than that, and the view there taken is entirely in accordance with the view of the law expressed in the judgments of the Law Lords in *Lynch v. Knight*, 9 H.L.C. 577, and with the dictum of Littledale, J., in *Rex v. Moore* (1832), 3 B. & Ad. 184, where he said: 'If the experience of mankind must lead any one to expect the result, he' (the defendant) 'will be answerable for it' (3 B. & Ad. at p. 188). In the ordinary course it can be shewn by evidence that a defendant has published a libel which he knows must necessarily be widely circulated. If the facts stated in this paragraph are admissible in evidence, then the case comes within the decision in *Millington v. Loring* (1880), 6 Q.B.D. 190." And Williams, J., said: "I think the plaintiffs can shew by evidence that the diffusion of the libel was likely to be large, and that evidence will be admissible to shew the circumstances under which the defendant must have contemplated that the libel was likely to be widely diffused."

The slander in the present case was so gross and outrageous, published as it was at a large gathering of neighbours at a threshing, that one feels anxious to support the verdict, if possible, upon any just ground. But, after a careful consideration of the evidence, I am unable to say that the illness of the plaintiff was the natural result of the slander or intended as a result of the words spoken by the defendant. There is not a tittle of evidence to justify in the slightest degree the outrageous conduct of the defendant, in attacking, without a shadow of a cause, the plaintiff's moral character. While the damages must be reduced to nominal damages, \$1, that is sufficient to rehabilitate the plaintiff in the good opinion of the public. The plaintiff is entitled to her full costs without set-off in the Court below; but, under the circumstances, the defendant is not entitled to the costs of appeal.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed with CLUTE, J.

KELLY, J.:—Not without some reluctance do I find myself bound to agree with the conclusion of my brother Clute, that, on the evidence, the appellant is liable for nominal damages only. He should pay the costs of the Court below without set-off, but should not have any costs of the appeal.

The language complained of and sworn to by a number of

witnesses, whom the jury believed, was inconceivably vulgar and disgusting, and elicited the jury's emphatic condemnation when rendering their verdict.

The result of the decision will, however, vindicate the character of the plaintiff, and, it is hoped, convince the appellant that he is not at liberty to cast aspersions on the good name of any one with impunity.

Appeal allowed.

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Municipal Corporations—Money By-law—Assent of Electors—Municipal Act, secs. 2 (o), 263 (5)—Necessary Publication in Newspaper of Municipality—Imperative Duty—Non-compliance with Direction of Statute—Disregard of Principles of Act—Application of Curative Provisions of sec. 150.

A village by-law which, under sec. 263 of the Municipal Act, R.S.O. 1914, ch. 192, required the assent of the electors, was quashed because a copy of the proposed by-law was not published in a newspaper in the village—there being such a newspaper—but was published in a newspaper of another village some miles distant, contrary to the provisions of sec. 263 (5), read in the light of the definition of "published" in sec. 2 (o). It was *held*, that the statutory duty to publish was imperative; that failure to publish was a disregard of the principles of the Act; and, therefore, the defect or irregularity was not cured by the application of the saving provisions of sec. 150. Decision of MEREDITH, C.J.C.P., *ante* 6, reversed.

AN appeal by B. R. Poulin from the order of MEREDITH, C.J.C.P., *ante* 6, dismissing an application to quash a money by-law.

February 14. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

McGregor Young, K.C., for the appellant, argued that there had been no publication of the by-law within the meaning of the Municipal Act, R.S.O. 1914, ch. 192, sec. 263, sub-sec. (5), and sec. 2 (o), as the advertisement had not appeared in the L'Original newspaper. The omission to publish was not an irregularity curable under the provisions of sec. 150 of the Act. Publication in the municipality, where possible, as here, was imperative, and failure to do so was disregard of the principle of the Act, and was fatal to the by-law: *Re Mace and County of Frontenac* (1877), 42 U.C.R.

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70; *Cartwright v. Town of Napanee* (1905), 11 O.L.R. 69; *Re Cartwright and Town of Napanee* (1906), 8 O.W.R. 65; *In re Rickey and Township of Marlborough* (1907), 14 O.L.R. 587; *Re Sharp and Village of Holland Landing* (1915), 34 O.L.R. 186, 24 D.L.R. 160; *In re Salter and Township of Beckwith* (1902), 4 O.L.R. 51; *Re Begg and Township of Dunwich* (1910), 21 O.L.R. 94; *Rex ex rel. Yates v. Lawrence* (1915), 7 O.W.N. 819, 22 D.L.R. 599. Counsel also contended that the council had not power to pass the by-law, as the two sums mentioned in the by-law could not be voted on in the one by-law.

No one opposed the appeal.

March 25. MULLOCK, C.J.Ex.:—This is an appeal from the judgment of Meredith, C.J.C.P., dismissing an application to quash a money by-law of the Municipal Corporation of the Village of L'Orignal, on the grounds (1) of want of publication and (2) of want of power in the council to pass the by-law.

The by-law, before its final passing by the council, required the assent of the electors, and sec. 263, sub-sec. (5), of the Municipal Act enacts that such a proposed by-law "shall be published once a week for three successive weeks," and sec. 2(o) defines "published" and "publication" thus: "'Published' shall mean published in a newspaper in the municipality to which what is published relates, or which it affects, or if there is no newspaper published in the municipality, in a newspaper published in an adjacent or neighbouring municipality; and 'publication' shall have a corresponding meaning."

The proposed by-law related to the construction of public works within the corporate limits of the Village of L'Orignal, and the raising of money by the taxation of electors in that municipality wherewith to pay for these proposed works. Thus the subject-matter related to the respondent municipality. There was a newspaper published in the municipality; and, under these circumstances, the statute required that the by-law be published in that municipality. This was not done, but, instead, it was published in another municipality.

Under these circumstances, such publication was a nullity as regards compliance with the statutory requirements; and therefore, as regards the question now under consideration, it has to be

determined as if the council could legally pass a money by-law without any previous publication thereof.

The learned Chief Justice of the Common Pleas was of opinion that such non-compliance with the requirement of the statute was an irregularity which might be cured under the provisions of sec. 150.* The curative provisions of that section apply only where the election is "conducted in accordance with the principles laid down" in the Act.

I am of opinion that the statutory duty to publish is imperative, and that failure to do so is a disregard of the principles of the Act.

In *Re Mace and County of Frontenac*, 42 U.C.R. 70, a county by-law under the Canada Temperance Act of 1864 was successfully attacked because of non-publication in accordance with the statutory requirements, which in that case were similar to those present here; and Armour, J., at p. 88, observed that "'due publication' is an essential pre-requisite to the passing of the by-law."

In *Cartwright v. Town of Napanee*, 11 O.L.R. 69, a motion was made to quash a money by-law because of its not having been published the number of times required by the statute, and Meredith, J., being of opinion that the curative provisions of the statute applied, refused to quash it. The applicant appealed, but before the appeal was argued the Legislature validated the by-law, enacting however that such legislation was not to affect the costs of the then pending appeal, but that the Court might deal with them as if the validating Act had not been passed; and the Court of Appeal awarded costs to the appellants, observing: "The appellants were quite within their rights in objecting when and as they did to the . . . municipality . . . assuming to act upon a by-law which was passed without due regard to the provisions of the statute." *Re Cartwright and Town of Napanee*, 8 O.W.R. 65, 67.

In *In re Rickey and Township of Marlborough*, 14 O.L.R. 587, 594, a local option by-law was attacked. The then Municipal Act, 3 Edw. VII. ch. 19, sec. 338, required that "the day . . . fixed for taking the votes shall not be less than three nor more than five weeks after the first publication of the proposed by-law." The voting was held after publication for two but before publication for three weeks; and Teetzel, J., delivering the judgment of the Divisional Court, said: "I am of opinion that a publication for

*Sec. 150 is by sec. 274 made applicable to voting on a by-law.

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only two, when the statute requires three, successive weeks, is not such an irregularity as sec. 204 (the curative section) contemplates."

With respect, I find myself unable to agree with the view of the learned Chief Justice of the Common Pleas, and think the by-law should be quashed.

This conclusion being reached on the first ground, it is not necessary to deal with the second.

The appellant is entitled to costs of the motion and of this appeal.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J.Ex.

RIDDELL, J.:—In the view I take of the case, it is not necessary to say more of the contents of the by-law than that it is a by-law requiring the assent of the electors, under sec. 263 of the Municipal Act.

The Act, by sec. 263 (5), provides that, before such a by-law is voted upon, "a copy of the proposed by-law . . . shall be published once a week for three successive weeks . . .;" unless there is no newspaper published in the municipality, sec. 2 (o) of the Act makes this mean "published in a newspaper in the municipality." In the present case, as there was and is a newspaper published in L'Orignal, the statute must be construed as though it read "a copy of the proposed by-law . . . shall be published once a week for three successive weeks in a newspaper published in L'Orignal."

This was not done: but for some reason, not apparent on the material before us, a copy was printed in a newspaper at Hawkesbury, some miles away. This is clearly not a compliance with the statute: it is not "publication" at all: sec. 2 (o).

The sole question then is whether sec. 150 saves the by-law—I think it does not.

I agree with what is said by Mr. Justice Middleton in *Rex ex rel. Yates v. Lawrence*, 7 O.W.N. 819, at p. 820: "It is not easy to define matters that come within the scope of sec. 150, nor do I think that it would be wise to attempt to do so." I am not sure that the section "does not entitle the Court to disregard the violation of an express provision of the statute," as there have been many instances where the Court has in effect

done that. But, if the section ever does entitle the Court to disregard the violation of an express provision of the statute, it can only be when it appears that the election was conducted in accordance with the principles laid down in the Act, as indeed the section itself says.

To my mind, one of the principles laid down in the Act is, that the electors in a municipality in which there is a newspaper, will receive notice through that newspaper (or one of them if there are more than one) when any by-law is to be voted upon. If a publication in Hawkesbury were sufficient, it is hard to see why publication in an Ottawa or a Toronto paper would not answer. Speaking from common knowledge, it is certain that a voter in a small town or village is much more likely to take in a city newspaper than a local paper published in a neighbouring and probably rival town or village. (Every one who has ever lived in such a municipality knows the truth of this statement.) Moreover, there are often ratepayers and electors who would be materially affected from a financial point of view by such by-laws who do not reside the year round in the municipality. It would be intolerable to cast upon these the burden of taking or at least reading all the newspapers in all the neighbouring towns and villages, at the peril of having heavy taxation upon their property, without their being able to vote and use their influence against it.

The cases of *Re Begg and Township of Dunwich*, 21 O.L.R. 94 (in which, p. 99, I consider myself bound by *In re Salter and Township of Beckwith*), and *In re Salter and Township of Beckwith*, 4 O.L.R. 51, were decided on a different wording in the statute, and are not now applicable. If anything said in either is opposed to the present determination, it is not to be followed. It is not necessary to cite the previous cases, most of which will be found in Meredith & Wilkinson's Canadian Municipal Manual, pp. 167-170.

I would allow the appeal with costs throughout—and do not pass upon the other question raised.

KELLY, J.:—I agree in the conclusion of his Lordship the Chief Justice and my brother Riddell, that this appeal must be allowed and that non-publication in a newspaper published in the municipality to which the proposed by-law relates or which it affects,

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is more than an irregularity curable by the provisions of sec. 150 of the Municipal Act (R.S.O. 1914, ch. 192).

I take it to be so that where there is a newspaper published in the municipality to which what is published relates (or which it affects) it is imperative that publication shall be in that newspaper (or in one of such newspapers if more than one), and it is not optional to publish it in a newspaper in an adjoining or neighbouring municipality.

There was in this instance a newspaper published in the municipality in question; non-publication in it is fatal to the respondent's case.

The appellant is entitled to his costs of the appeal and of the motion to quash.

Appeal allowed.

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Mar. 25.

[APPELLATE DIVISION.]

COOP v. ROBERT SIMPSON CO.

Negligence—Collision of Motor-vehicles in Highway—Passenger in one Vehicle Killed—Action under Fatal Accidents Act against Owners of other Vehicle—Findings of Jury on Questions Submitted—Form of Questions—Evidence of Negligence—Motor Vehicles Act, sec. 11 (2)—Judge's Charge—Liability for Negligence Causing or Contributing to Accident, notwithstanding Negligence of other Wrongdoer—Passenger not Affected by Negligence of Driver—Trial—Conviction of Driver for Manslaughter at same Assizes—Knowledge of Jurors—Some Jurors Serving on both Juries—Effect of—Absence of Complaint at Trial—Refusal to Admit Verdict of Coroner's Jury and Indictments in Evidence—Unsatisfactory Findings—New Trial.

The plaintiff's husband, seated in the side-car of a motor-cycle, owned and driven by L., was killed in a collision between the motor-cycle and a motor-truck, owned by the defendants and driven by W., upon a city highway. This action was brought, under the Fatal Accidents Act, to recover damages for his death. L. and W. were severally charged with manslaughter by reason of the death of the plaintiff's husband; the grand jury found a true bill against L., and he was tried and convicted, but the bill against W. was ignored by the grand jury. This action was tried at the assizes at which the criminal proceedings were had; some of the jurors who convicted L. were on the jury which tried this action; and the counsel for the Crown in the criminal case was counsel for the defendants in the trial of the action. In the trial of the action questions were left to the jury, and upon their answers judgment was pronounced by the trial Judge dismissing the action without costs. Questions 1 and 2 with their answers were: (1) Was the death of J. C. caused by reason of a motor-vehicle on a highway? Ans. "Yes." (2) If so, who was the owner and who was the driver of the motor-vehicle? Ans. "L." By their answers to the other questions, the jury in effect found that the death was not caused by the negligence or improper conduct of the driver of the defendants' motor-truck, causing or contributing to the accident; that L. was guilty of negligence causing or contributing to the accident, consisting in not stopping or turning out of the way; and that W., after he saw and apprehended the danger, could have done nothing which would have prevented the accident:—

Held, (RIDDELL, J., dissenting), that, having regard to the knowledge of the jury of the result of the criminal proceedings, and the evidence and the Judge's charge at the trial of the action, the findings of the jury were unsatisfactory; and there should be a new trial.

There was evidence upon which the jury might have found that the defendants' driver, W., was guilty of negligence which caused or contributed to the accident. The attention of the jury should have been directed to sec. 11 (2) of the Motor Vehicles Act, R.S.O. 1914, ch. 207. It appeared to be assumed throughout the trial that the negligence of L. might affect the plaintiff's right to recover. The jury should have been distinctly told that, unless the deceased was guilty of some default amounting to contributory negligence, he was not affected by the fact that L. was guilty of negligence that caused the accident; and that they might find the defendants guilty of negligence if W.'s conduct contributed to the accident, notwithstanding their finding that L. was also guilty of negligence. A person injured by more than one wrongdoer may maintain an action for the whole damage to him against any of them. The jury should also have been clearly instructed that the criminal proceedings determined nothing in regard to the civil liability of the defendants.

Mills v. Armstrong, The Bernina (1888), 13 App. Cas. 1, followed.

Per RIDDELL, J.—The plaintiff, by not challenging or making objection to the jurors who had served in the criminal case, had lost the right to complain. The verdict at a coroner's inquest and the indictments preferred were properly excluded by the trial Judge. The case was fairly tried; the Judge's charge was sufficiently explicit; the plaintiff was not prejudiced by the form of the questions or in any way; and the defendants were entitled to judgment.

APPEAL by the plaintiff (the widow of Joseph Coop) from the judgment of HODGINS, J.A., at the trial, upon the findings of a jury, dismissing, without costs, an action, under the Fatal Accidents Act, to recover damages for the death of Joseph Coop, who was killed in a collision between a motor-truck of the defendants, driven by one Wooton, and a motor-cycle, owned and driven by one Lowry, in the side-car of which the deceased was sitting when the collision occurred, upon a street in the city of Toronto. The plaintiff alleged negligence on the part of the driver of the motor-truck.

February 15. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

W. A. Skeans, for the appellant. The driver of the motor-cycle and the driver of the motor-truck were both committed for trial for criminal negligence, and in the case of the driver of the motor-cycle a true bill was found and he was found guilty. In the case of the driver of the motor-truck no bill was found. The jury which tried the driver of the motor-cycle and found him guilty was subsequently represented on the jury called to try this case, involving practically the same issues or the same facts

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and circumstances, and it was not made clear to them in the charge that the case which they had disposed of in the criminal trial had no bearing on the civil action. The learned trial Judge refused at the hearing to dismiss from the jury those who sat upon the former case, and he did not in any way refer to the criminal proceedings or explain to the jury, as he should have done, that the verdict of "guilty" against the driver of the motorcycle in a criminal proceeding for neglect did not affect the right of the plaintiff to recover against the other party. The jury trying one case after the other must necessarily be confused and prejudiced. The Crown counsel acting at these assizes and presenting the indictment against both the drivers was also counsel for the defendants on the trial of this action, which added to the confusion and made it difficult for the plaintiff to have a fair trial. The jury could not easily distinguish between the Crown counsel asking for a conviction against one party concerned, on behalf of the Crown, and having the carriage of the proceedings against both as representing the Crown, and the same counsel advocating the private interests of one of the parties on the same facts. The learned Judge erred in failing to charge the jury that the burden of proof rested upon the defendants, according to the Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 23. Not only was there no direction to that effect, but the questions submitted excluded such onus. The learned Judge should have charged the jury that the plaintiff was entitled to recover, notwithstanding the negligence of Lowry, unless Coop in some way himself contributed to the accident: *Mills v. Armstrong, The "Bernina"* (1888), 13 App. Cas. 1; *Mathews v. London Street Tramways Co.* (1888), 5 Times L.R. 3.

Peter White, K.C., and *H. S. Sprague*, for the defendants, respondents, argued that the charge had been eminently fair, the jury had been properly chosen, and had not been prejudiced either by the fact that three of their number had been on the panel of the Lowry criminal trial, or by the fact that the Crown counsel had taken part in the trial of this action.

Skeans, in reply.

March 25. CLUTE, J.:—Appeal from the judgment of Hodgins, J.A., on the findings of a jury, dated the 23rd November, 1917.

The plaintiff is the widow of Joseph Coop, who was killed on the 9th July, 1917, in a collision at the corner of Gould and Victoria streets, in the city of Toronto. The plaintiff was a passenger in the side-car of a motor-cycle coming north on Victoria street, driven by one Lowry.

A motor-truck of the defendants was coming west on Gould street. The collision took place at the intersection of Gould and Victoria streets, within 6 or 7 feet of the north-west corner of the intersection. The driver of the motor-truck saw the motor-cycle approaching when about 30 feet south of the south side of Gould street, and the driver of the motor-cycle saw the truck when it was about an equal distance—two lengths—to the east of Victoria street.

The motor-truck had the right of way, and the accident was undoubtedly caused by the driver of the motor-cycle disregarding this fact. The law had only recently come into force, and he swears that he was not aware of it. The motor-truck slowed down slightly on approaching Victoria street. The motor-cycle, intending to go in front of the truck, increased its speed somewhat. It is said by the driver of the motor-cycle that, seeing the truck slow down, he assumed that it was going to stop so as to enable him to pass in front of it. The driver of the truck looked towards the north, as it was his duty to do, as under the law a motor-vehicle coming from that direction would have the right of way. The motor-cycle endeavoured to cross in front of the truck, and the right wheel of its side-car struck the left fore-wheel of the truck, throwing the plaintiff's husband, Joseph Coop, from the side-car and killing him. The driver of the truck did not sound his horn. He was travelling at a speed of about 13 miles an hour, according to his own statement, and he slowed down as he approached the intersection two or three miles per hour. There is other slight evidence of a person at a distance of some 200 feet, who stated that he was driving in a "rig" at 5 miles an hour, and that the car, in his opinion, was going four times as fast as he was.

It is said by one witness that the traffic was heavy on the street at the time.

The following are the questions put and the answers thereto:—

"1. Was the death of Joseph Coop caused by reason of a motor-vehicle on a highway? A. Yes.

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"2. If so, who was the owner and who was the driver of the motor-vehicle? A. Lowry.

"3. If the defendants, the Simpson company, were the owners of a motor-vehicle upon a highway at the time of the death of Joseph Coop, which you find caused his death, has the evidence given in this case satisfied you that his death was not caused by the negligence or improper conduct of the driver of their motor-vehicle? A. Yes.

"4. If not so satisfied, was the accident caused by the negligence of the driver of the defendants' motor-vehicle causing or contributing to the accident? If guilty of any negligence, state fully in what that negligence consisted? A. No.

"5. Was the driver of the motor-cycle, in the car of which Joseph Coop was riding, guilty of any negligence causing or contributing to the accident? A. Yes.

"6. If so, what was that negligence? A. Not stopping or turning out of the way.

"7. If the driver of the motor-cycle was guilty of negligence causing or contributing to the accident, could the driver of the motor-vehicle owned by the defendants, the Simpson company, after he saw or ought to have seen and apprehended the danger, have done anything which would have prevented the accident? A. No.

"8. If so, what could he have done which he neglected to do? (Not answered).

"9. What damages, if any, has the plaintiff suffered, which the defendants, the Simpson company, should pay, by reason of the negligence of their driver, if you find that he was guilty of any negligence causing the accident? (Not answered)."

It will be seen that questions 1 and 2 are given with reference to sec. 23 of the Motor Vehicles Act, and with the object of ascertaining by whom the loss and damage was caused. Section 23 has reference to the onus of proof, and declares that when loss or damage is sustained by any person by reason of a motor-vehicle on a highway the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor-vehicle shall be upon the owner or driver. It will be observed that the answers given to questions 1 and 2 do not deal with the question of negligence, either of the driver of the motor-cycle or of the truck.

The third question also is formulated with reference to sec. 23, and apparently was intended to be answered only "if the defendants, the Simpson company, were the owners of a motor-vehicle upon a highway at the time of the death of Joseph Coop, which you find caused his death;" but the jury did not find that it was the motor-truck that caused his death. They found that it was the motor-cycle, driven by Lowry. This question, therefore, under the previous finding, did not call for an answer.

The Judge points out that if they are not so satisfied, then the 4th question is asked: "Was the accident caused by the negligence of the driver of the defendants' motor-vehicle causing or contributing to the accident?" And the jury answered "No;" and, by the answers to the 5th and 6th questions, they find that the driver of the motor-cycle was guilty of negligence causing or contributing to the accident by not stopping or turning out of the way; and, by the answer to question 7, they find that the driver of the defendants' truck, after he saw or ought to have seen and apprehended the danger, could not have done anything which would have prevented the accident.

The usual question—"Was the defendant guilty of negligence that caused the accident; if so, what was the negligence?"—was not asked.

As to the 5th question, the learned trial Judge says: "I ask that because it is yet uncertain, if he was guilty of negligence, how far that would affect the plaintiff in this accident;" that is, if the driver of the motor-cycle was guilty of negligence, would the deceased, riding as a passenger, be so affected thereby as to preclude his representative from recovery? This question is referred to by counsel (p. 99 of the evidence):—

"Mr. McRuer: Now, my Lord, in that fifth question, I think if your Lordship will read it again——

"His Lordship: Yes, that refers to the motor-cycle. Now you say you want it put in as to the truck?

"Mr. McRuer: Yes, my Lord.

"His Lordship: I am asking the third question. The onus is on them.

"Mr. McRuer: Taking out the question of the Motor Vehicles Act altogether, if these defendants were partially liable for the accident, then, according to the case I have submitted to your

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Lordship, and this decision of Chief Justice Meredith, we are entitled to recover against them.

"His Lordship: I do not know why.

"Mr. McRuer: I submit that that is the law.

"His Lordship: Let me see the case of Chief Justice Meredith. There is no reason that you should not have anything found that will be useful to you. I have no objection, but the questions are long enough and involved enough now. Where do you find that this case requires it?"

The learned counsel for the plaintiff then points out that, if the jury had the impression that the plaintiff must establish that the Robert Simpson Company driver was the sole cause of the accident, it would be unfair to the plaintiff. "We ought to ask them if the negligence of the driver of the Simpson company truck, in whole or in part, caused the accident."

"Mr. White: Your Lordship could use the same expression as is used in question 5, causing or contributing to the accident, and this was the phrase used in questions 4 and 5."

It will be observed that this conversation took place after the charge to the jury, and I do not find it anywhere stated in the charge that the plaintiff was entitled to recover, notwithstanding the negligence of Lowry, unless Joseph Coop in some way himself contributed to the accident: *Mills v. Armstrong, The Bernina*, 13 App. Cas. 1, overruling *Thorogood v. Bryan* (1849), 8 C.B. 115, and *Armstrong v. Lancashire and Yorkshire R.W. Co.* (1875), L.R. 10 Ex. 47, in which the doctrine of identification was held to defeat the plaintiff's claim.

In *Thorogood v. Bryan*, Coltman, J., said (p. 130):—

"It appears to me, that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that, if any injury results from their negligence, he must be considered a party to it."

And Vaughan Williams, J., said (p. 133):—

"I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed by."

Lord Herschell in *Mills v. Armstrong, The Bernina*, 13 App. Cas. 1, quoting these observations, says (p. 7):—

"With the utmost respect for these eminent Judges, I must

say that I am unable to comprehend this doctrine of identification upon which they lay so much stress." And, referring to the judgment of Maule, J., in the *Thorogood* case, that the passenger selects the conveyance and must take the consequence of any default on the part of the driver whom he thought fit to trust, Lord Herschell proceeds (p. 8):—

"I confess I cannot concur in this reasoning. I do not think it well-founded either in law or in fact. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter?" And again (p. 9): "If by a collision between two vehicles a person unconnected with either vehicle were injured, the owner of neither vehicle, when sued, could maintain as a defence, 'I am not guilty, because but for the negligence of another person the accident would not have happened.'"

The case proceeded throughout on the assumption that the negligence of the driver of the motor-cycle might affect the plaintiff's right to recover. I think the jury should have been distinctly told that, unless the deceased was guilty of some default on his part amounting to contributory negligence, he was not affected by the fact that the driver of the motor-cycle was guilty of negligence that caused the accident; and should have been further instructed that they might find the defendants guilty of negligence if the driver of the truck was guilty of any negligence that contributed to the accident, notwithstanding the fact that they found the driver of the motor-cycle also guilty of negligence.

The driver of the motor-truck did not sound his horn. The accident happened at an intersection in the central part of the city. There is evidence (Hopkins) that the traffic was heavy at the time. It was for the jury to consider whether the rate of speed, the omission to sound the horn, and the other surrounding circumstances, were such as to constitute negligence, notwithstanding the fact that the speed of the motor-truck was less than 15 miles an hour, and their attention should, I think, have been directed to the law bearing upon this question:—

Section 11 (2) of the Motor Vehicles Act: "Notwithstanding the provisions of sub-section 1," that is, as to the rate of speed within a city, "any person who drives a motor-vehicle on a highway recklessly or negligently, or at a speed or in a manner which is danger-

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ous to the public, having regard to all the circumstances, including the nature, condition and use of the highway and the amount of traffic which actually is at the time, or which might reasonably be expected to be on the highway, shall be guilty of an offence under this Act."

The conduct so described might amount to negligence if it was a contributing cause of the accident.

These further instructions to the jury were especially called for in this case, inasmuch as David Lowry, the driver of the motor-cycle, was indicted at the same Court for criminal negligence in connection with this accident. A true bill was found, and he was convicted. It was necessary, therefore, in my opinion, to guard the mind of the jury against associating the right of the plaintiff to recover with the guilt of the driver of the motor-cycle, Lowry.

After a careful reading of the evidence, one cannot but feel that it was rather a contest between the driver of the motor-cycle and the driver of the defendants' truck, and this is supported by the questions and answers, 1, 2, 5, and 6, which all had reference to Lowry, whereas Lowry's negligence should have been eliminated when dealing with the question as to whether or not the defendants were guilty of negligence which caused or contributed to the accident. It is quite true that the answers to questions 3 and 4, eliminating the introduction, are in effect findings against the plaintiff, and so is the answer to question 7, but they are so connected with the negligence of the driver of the motor-cycle that, without further instructions to the jury, they were in danger of treating the question as one wholly between the drivers of the motor-cycle and the defendants' truck. It could not but have been common knowledge to the jury, whether upon this panel or not, that Lowry had been tried and convicted of negligence in this accident at the same Court; and, notwithstanding the very careful charge of the learned trial Judge, and with great respect, I think the trial, in its essential feature, as above indicated, was unsatisfactory, and there ought to be a new trial.

Costs of the former trial and of this appeal to be costs in the cause.

MULOCK, C.J. EX.:—This is an appeal from the judgment of Hodgins, J.A., who, on the findings of the jury, directed judgment for the defendant company. I have had the advantage of reading the judgment of my brother Clute, and agree with his conclusions. At the same time, I desire to express my views upon certain features of the case. The facts are so fully set forth in his judgment that it is unnecessary for me to do more than summarise those to which I may refer.

As the case goes back for a new trial, I abstain from a critical examination of the evidence, but refer to it only to the extent of indicating that there was evidence which would have supported a finding by the jury of negligence on the part of the defendants. Such evidently was the view of the learned trial Judge, for he did not withdraw the case from the jury.

It appears that one Lowry was driving a motor-cycle northerly along the easterly side of Victoria street, in the city of Toronto, and one Joseph Coop was a passenger with him in the motor-cycle. As Lowry approached Gould street, which intersects Victoria street at right angles, he observed the defendants' motor-truck at a point about 30 feet easterly of Victoria street, coming westerly along Gould street, and that it slackened speed and did not sound the gong. These two circumstances led Lowry to think that the driver of the truck, observing the movement of the motor-cycle, was conceding to him the right of way; and, accordingly, he accelerated his speed in order to cross Gould street in front of the truck. The truck, however, according to Lowry's evidence, then increased its speed, and as the two vehicles approached each other they both endeavoured to avoid a collision, the motor-cycle swerving to the left and the truck to the right; nevertheless they collided, the cycle striking the side of the truck, when Coop was killed by the impact.

Lowry swore that but for the motor-truck slowing down and omitting to sound the gong he could have avoided the accident.

There is also evidence from which the jury might have found that the truck approached Victoria street at an excessive speed, and thereby caused or contributed to the accident. Lowry in his evidence admitted negligence on his part and appeared to consider himself wholly responsible for the accident; but, even if his negligence was one of the causes of the accident, if the defendants also contributed to it, they also are answerable to the plaintiff.

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As said by Lord Esher in *The Bernina* (1887), 12 P.D. 58, 83, affirmed in the House of Lords, *Mills v. Armstrong, The Bernina*, 13 App. Cas. 1:—

“The rule of law is, that a person injured by more than one wrongdoer may maintain an action for the whole damage done to him against any of them.”

In the same case at p. 99, Lopes, L.J., says:—

“A passenger in an omnibus, whose injury is caused by the joint negligence of that omnibus and another, may in my opinion maintain an action, either against the owner of the omnibus in which he was carried, or the other omnibus, or both.”

In *Mathews v. London Street Tramways Co.*, 5 Times L.R. 3, the plaintiff was a passenger in an omnibus which collided with a car of the defendant company, whereby the plaintiff was injured; and, following *The Bernina* case, it was held that as a matter of law it should have been made clear to the jury that the question for them was, “Did the negligence of the tram-car, in whole or in part, cause the accident?” And the fact that the omnibus was also negligent mattered not, and was no answer to the plaintiff’s claim.

In the present case the jury was not instructed that negligence on the part of Lowry would not relieve the defendants from liability, if they by any negligence on their part had also contributed to the accident. The effect of the charge rather was that the jury must determine which party, Lowry or the defendants, was guilty of the negligence which caused the accident, whereas they should have been instructed that, if the defendants by their negligence contributed to the accident, Lowry’s negligence would not relieve them from liability, and that, in their relation to the plaintiff, each by negligently contributing to the accident is a wrongdoer.

When the combined negligence of different persons causes injury to an innocent person, there are no degrees of liability, but each is liable as a principal to the person so injured.

There were also present in this case circumstances which, I think, made it specially important that the jury should not have been left in any doubt that Lowry’s negligence could not excuse any negligence by the defendants which caused or contributed to the accident.

It appears that at the Toronto assizes, held in the month of November, 1917, Lowry and Wooton, the driver of the defendants' motor-truck, were indicted for manslaughter in having caused Coop's death. The grand jury did not find a true bill against Wooton, but they did against Lowry, and on the 16th November he was tried for manslaughter and found guilty. On the 22nd November, at the same assizes, this action was tried with a jury, and three of the jurymen who were on the jury which tried Lowry were on the jury in this action.

It may be fairly assumed, I think, that the entire panel was aware that Lowry had been found guilty of manslaughter, and that no bill had been found against Wooton, and it is not improbable that these two circumstances created the impression on the minds of the jury that, as regards civil liability, Lowry alone would be liable. Inasmuch as the civil action arose out of the same occurrence as did the criminal prosecution, it would, I think, have been expedient to postpone the civil trial until a future assize. That course, however, not having been adopted, it was the more advisable that any jurymen who tried Lowry should not serve on the jury in this case. The lay-mind was in great danger of assuming that the conviction of Lowry and failure to find a true bill against Wooton meant that no civil liability attached to the defendant company. Thus, at the commencement of the trial, it is probable that at least three of the jurymen were biased in the defendants' favour.

Under these circumstances, it was, I think, the more important that the jury should have been clearly instructed by the trial Judge that the criminal proceedings determined nothing in regard to the defendants' civil liability; and therefore that if, by any negligence on their part, they had contributed to the accident, they were liable, even if Lowry was negligent in a still greater degree.

For these reasons, I agree with my brother Clute that there should be a new trial.

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SUTHERLAND, J., concurred.

KELLY, J.:—I agree that there should be a new trial, and that the appeal should be allowed accordingly.

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Sufficient facts for an understanding of how and where the accident happened have been set out in the judgments of his Lordship the Chief Justice and of my brother Clute.

The question whether there was any negligence of the driver of the defendants' motor-truck which caused or contributed to the occurrence in which Coop met his death, should, in my opinion, have been put direct to the jury; or in any event they should have been plainly told that a finding (if they reached that stage) that Lowry, the driver of the motor-cycle, was guilty of negligence which caused or contributed to the accident, would not necessarily exclude negligence of the driver of the motor-truck contributing to the accident.

The jury, in their answers to the first and second questions, committed themselves to the conclusion that Coop's death was caused by reason of a motor-vehicle on the highway, of which vehicle Lowry was the owner and driver. These questions were not directly and exclusively aimed at ascertaining whose the negligence (if any) was, and it is possible that, in the absence of an express direction or of the direct question I have referred to, they may not have been aware that, if the evidence so warranted it, it was open to them to find negligence by both drivers; or they may have believed that, having found that Coop's death was caused by reason of a motor-vehicle on a highway and that Lowry was the owner and driver of that vehicle, they were precluded from a finding of any negligence by the driver of the motor-truck to which liability would attach.

Having regard to this and to Coop's position at the time—a mere passenger in a vehicle, over which, or over the driver of which, he had no control—the proper test of liability in such a case was not applied. That test is: was there negligence on the part of the driver of the vehicle which collided with that in which Coop was travelling which wholly or in part caused the accident? A question to that effect was proper to submit to the jury: *Mathews v. London Street Tramways Co.*, 5 Times L.R. 3.

In answering that question, had it been put to them, it would have been a proper matter for the jury's consideration whether, in the circumstances that arose, the proper course would have been for the driver of the motor-truck, in the exercise of reasonable care, to have sounded his horn, even though he had by law the

right of way over the motor-cycle. If there was any such duty resting upon him, and had he, as a precaution against accident, sounded his horn as a warning of his approach, it may have been that Coop, being so warned, could have done some act to protect himself against the impending danger. Lowry says he saw the motor-truck approaching, but there is no evidence that Coop saw it.

I agree, too, that there was grave danger that the members of the jury, or some of them at least, may not have been altogether free from impressions created by the knowledge they must have had (their duty called for their presence in Court down to the time of the trial) of the result of the criminal prosecution arising out of the same occurrence, in which Lowry was held liable.

We are unable to say whether they were affected by that result, but the danger was such that it seems to me that, for that very reason, as well, the safe course is to be found in directing a new trial.

RIDDELL, J.:—This was an action under the Fatal Accidents Act, R.S.O. 1914, ch. 151. The deceased, a man of 57 years of age, was, on the afternoon of the 9th July, about 4 o'clock, being carried north on Victoria street, Toronto, in the side-car of a motor-cycle, driven by one Lowry—a lad being seated behind the driver. On Gould street, at this time, there was a motor-truck belonging to the defendants, moving westward, under the guidance of one Wooton. At the intersection of the two streets, the motor-cycle struck the truck, the side-car wheel of the cycle striking the left front wheel of the truck; the deceased was killed in the collision.

The plaintiff, his widow, brought this action, relying upon the said Act, ch. 151—appealing also at the trial to the provisions of the Motor Vehicles Act, R.S.O. 1914, ch. 207. The action was tried before Mr. Justice Hodgins and a jury, when, on answers by the jury to questions, my learned brother dismissed the action. The plaintiff now appeals and asks for a new trial.

Some of the grounds of appeal are wholly novel in my experience, being based upon alleged facts not appearing in evidence and not verified in any way before us.

The facts are said to be that both Lowry and Wooton were

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committed for trial for the accident (I presume for manslaughter); that a true bill was found against Lowry, and he was convicted and fined, but the bill against Wooton was ignored by the grand jury—counsel for the defence in the present case having been Crown counsel. It is said that these proceedings took place at the same assizes, which was also an oyer and terminer, and that some of the jurors who convicted Lowry were on the jury in the present case.

(1) The first ground of this motion for a new trial is the presence of these jurymen. If these jurors should not have been on this jury, they were liable to a challenge *propter affectum*, either a principal challenge or to the favour. The grounds of such challenge are set out in Blackstone's Comm., Bk. III., p. 363, and Courts in England and the United States have followed the language of the Commentator with great fidelity. One of the grounds for a principal challenge *propter affectum* is, that the juror had previously been a juror in the same cause (e.g., a grand jurymen who took part in finding the bill). Had this been the fact here, the jurymen would be liable to be examined on a *voir dire*. But, while these jurymen had found that the negligence of Lowry had caused the death of Coop, this did not prevent them from holding that Wooton contributed to—and therefore caused—the accident. The challenge then would be a challenge to the favour, and the indifference of the jurors would be determined by triers.

Whether or not a challenge would have been successful we need not inquire—it is clear that in the ordinary case objection must be taken before the juror is sworn. If, indeed, the fact be not known at the time the juror is sworn, the objection may be taken afterwards: *State v. Tuller* (1867), 31 Conn. 280—see p. 294. But, if the party knows of the objection before the juror is sworn, and does not object, having exercised and depended on his own judgment, he will be considered to have waived the objection, and will not be granted a new trial on that ground: *Brown v. Sheppard* (1856), 13 U.C.R. 178; *Richardson v. Canada West Farmers' Insurance Co.* (1867), 17 U.C.C.P. 341; *Power v. Ruttan* (1836), 5 U.C.R. (O.S.) 132; *Shipman v. Birmingham* (1837), 5 U.C.R. (O.S.) 442.

If the objection to the juror appear after he is sworn, the

party may ask to have the jury discharged, or he may refuse go on further with the trial; he may then have relief in a proper case. Objection must be taken before verdict: *Doe d. Ashburnham v. Michael* (1851), 16 Q.B. 620. But, if he elects to go on and takes his chance before the jury, he cannot have a new trial in case the verdict goes against him: *Ham v. Lasher* (1862), 24 U.C.R. 533 (n.); *Widder v. Buffalo and Lake Huron R.W. Co.* (1865), 24 U.C.R. 520. And knowledge of counsel is in such a case knowledge of the client: *State v. Tuller*, 31 Conn. 280. Several American cases to the same effect are given in *Dilworth v. Commonwealth* (1855), 12 Gratt. (Virginia) 689, at pp. 692 *sqq.* Graham & Waterman on New Trials, vol. 2, p. 178 *sqq.*, have an elaborate dissertation on the subject, which may be consulted.

The fact that counsel's not insisting on an objection is due to deference to the trial Judge is of no significance: *Wood v. McPherson* (1888), 17 O.R. 163. In my experience, this excuse for not insisting on the rights of the client has in practically every case been wholly fictitious. It is the duty of counsel to insist courteously but firmly on the rights of his client, and he has no right to disregard that duty—I have found in my experience that such duty is well performed, as it should be. After the jury in the present case had been sworn, the following took place:—

“Mr. Skeans: My Lord, this case has practically been before the jury at the present assize, and a number of them, I understand, were sitting on the other case. I don't know whether that is an objection or not.

“His Lordship: I suppose you have the right to object to them. If you want to object to any of them, do so.

“Mr. White: Not now.

“Mr. Skeans: I do not want to object on that ground. Perhaps I should mention it.

“His Lordship: I am perfectly satisfied with the jury if you are.

“Mr. Skeans: I just mention it, that some of them, if not all, have had it before them and passed upon it in a criminal case, in which my learned friend was Crown prosecutor.

“His Lordship: Are you objecting?

“Mr. Skeans: I am not objecting. I leave that to your Lordship.

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"His Lordship: It is something which I have not anything to do with. The jury is selected by ballot.

"Mr. Skeans: I do not care to make an objection on that ground; I merely mention it to your Lordship."

It will be seen that counsel was asked more than once if he was objecting—in effect, was invited to object—and that he expressly said he was not objecting. The jury being sworn, the parties were entitled to have the case tried by that jury, unless there should be an objection raised. It was no part of the duty of the trial Judge to interfere with the jury except on legal grounds: had he interfered without the consent of both parties, there would have been good reason for complaint. It is not to be forgotten that the Court does not sit to do retributive justice, but justice according to law: and that the Court is not called upon to enforce any rights either party may raise, unless he asks for its enforcement. Every litigant should be allowed to claim what he wants and conduct his case as he wishes (so long as this is in accordance with law); and, in my opinion, a trial Judge has no more right, without consent, to raise an objection to a jurymen which neither party wishes to take the responsibility of, than he would have to call without consent a witness whom neither party would take the responsibility of calling—as to which see *In re Enoch and Zaretsky Bock & Co.'s Arbitration*, [1910] 1 K.B. 327 (C.A.), especially at p. 333.

I am of opinion that my learned brother acted most properly and legally: and that the plaintiff has lost any right she might have had to complain.

It looks very much as if the whole episode was a bit of by-play intended to induce the jurors to be so fair that they would (in common parlance) "lean backwards."

(2) At the close of the plaintiff's case, Mr. Skeans said he wished to have the coroner's inquest verdict put in. Mr. White stated that he had no objection. After some skirmishing, Mr. Skeans put his request thus: "I wish it produced if it is admissible;" and my learned brother said, "I am afraid I shall have to rule it is not." Taking this as an express ruling, I have no doubt that it is right. Previous verdicts even between the same parties are not evidence: *O'Connor v. Malone* (1839), 6 Cl. & F. 572 (see the many cases cited in the note on p. 572 of Perkins' American

edition of Clark & Fennelly, Boston, 1873): and *à fortiori* verdicts between different parties.

Then counsel took up the "indictment of the two men in this Court . . . to shew that both of these men were indicted by the Crown for negligence." It is plain, apart from the technical objection to produce an indictment, that the learned Judge was right in refusing to compel the production of the indictments.

Moreover, it is hard to see what good the plaintiff could have derived from them—they would shew that Lowry had been convicted by a jury for killing the plaintiff's husband, and that the grand jury had thought there was not evidence sufficient to put Wooton on his trial—how that would tend to establish the negligence of Wooton I fail to understand.

It is to be borne in mind that all the references to the criminal proceedings were by the plaintiff's counsel; the defendants made them no part of their case—there could be no "set-off of irregularities" to entitle the plaintiff to complain of the exclusion of evidence of these proceedings.

(3) Then some complaint is made of the form of question 1—I am not at all sure that I understand the objection, but it seems to be as follows. Questions 1 and 2 (with the answers) are as follows:—

"1. Was the death of Joseph Coop caused by reason of a motor-vehicle on a highway?" A. Yes.

"2. If so, who was the owner and who was the driver of the motor-vehicle? A. Lowry."

It is said that these questions limit the jury to find that only one motor-vehicle on a highway caused the death of Joseph Coop—the reading of the questions themselves answers this objection: it was quite open to the jury to find that both vehicles caused the death.

(4) It is contended that the learned Judge did not charge correctly or sufficiently on the question of onus, as laid down by the Motor Vehicles Act, sec. 23. No objection was taken to the charge, nor, as I think, could there be. The charge reads:—

"The third question is: 'If the defendants, the Simpson company, were the owners of a motor-vehicle upon a highway at the time of the death of Joseph Coop, which you find caused his death, has the evidence given in this case satisfied

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you that his death was not caused by the negligence or improper conduct of the driver of their motor-vehicle?' The statute says that, when loss or damage is sustained by any person by reason of a motor-vehicle on a highway, the owner of that vehicle must satisfy the onus of shewing that the loss or damage did not arise through the negligence or improper conduct of himself or of the driver. You are entitled to take the whole of the evidence into consideration there; it is not the mere question whether the evidence they alone gave would be sufficient to satisfy you. You may say upon the whole case if they have satisfied you to that effect."

The form of the question is proper: I have employed it myself when sitting at *nisi prius*, and I think it fairest to the plaintiff. The chargè as to onus is accurate and clear—so much so as to satisfy counsel at the trial, whose duty it was, if he thought it defective in any way, to bring the matter to the attention of the trial Judge.

(5) Something is attempted to be made of the supposed error of the trial Judge in considering Coop identified with Lowry—the plain answer to this objection is, that my brother was endeavouring to meet every possible view of the law by having the jury determine every fact which, in any view of the law, might be relevant—all the jury had to pass upon was the fact, which had no relation to the question of law. This is what was said:—

"The next question is: 'Was the driver of the motor-cycle, in the car of which Joseph Coop was riding, guilty of any negligence causing or contributing to the accident?' I ask that because it is yet uncertain, if he was guilty of negligence, how far that would affect the plaintiff in this accident. Then I ask, 'If so, what was that negligence?'"

My learned brother did not tell the jury what the law was; and, if he did, the jury were not questioned about Coop, but about Lowry—no suggestion of identification could possibly affect the finding as to the negligence of Lowry.

(6) The case seems to have been fairly tried, and there is no reason for interfering with the findings of the jury.

The questions and answers succeeding Nos. 1 and 2 are as follows:—

"3. If the defendants, the Simpson company, were the owners

of a motor-vehicle upon a highway at the time of the death of Joseph Coop, which you find caused his death, has the evidence given in this case satisfied you that his death was not caused by the negligence or improper conduct of the driver of their motor-vehicle? A. Yes.

"4. If not so satisfied, was the accident caused by the negligence of the driver of the defendants' motor-vehicle causing or contributing to the accident? If guilty of negligence, state fully in what that negligence consisted? A. No.

"5. Was the driver of the motor-cycle, in the car of which Joseph Coop was riding, guilty of any negligence causing or contributing to the accident? A. Yes.

"6. If so, what was that negligence? A. Not stopping or turning out of the way.

"7. If the driver of the motor-cycle was guilty of negligence causing or contributing to the accident, could the driver of the motor-vehicle owned by the defendants, the Simpson company, after he saw or ought to have seen and apprehended the danger, have done anything which would have prevented the accident? A. No.

"8. If so, what could he have done which he neglected to do? (Not answered).

"9. What damages, if any, has the plaintiff suffered, which the defendants, the Simpson company, should pay, by reason of the negligence of their driver, if you find that he was guilty of any negligence causing the accident? (Not answered)."

These may not all have been necessary; but the plaintiff could not be prejudiced by any of them; and, on the answers, the defendants were entitled to judgment.

I would dismiss the appeal with costs.

New trial ordered; RIDDELL, J., dissenting.

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Assignments and Preferences—Assignment for Benefit of Creditors—Interest of Assignor under Lease of Land and in Building Erected thereon—Assignment to Creditor as Security for Debt—Subsequent Chattel Mortgage on Building (Treated as Chattel) to another Creditor—Priorities—Construction of Lease—Reservation—License—Building Annexed to Freehold—Ineffectiveness of Chattel Mortgage—Impeachment under Assignments and Preferences Act, sec. 5 (1)—Intent—Bona Fides—Sec. 6 (1)—Present Actual Advance of Money—Findings of Trial Judge.

E. (a trader) was the lessee of land for 10 years, under an instrument, executed in 1909, purporting to be a lease made pursuant to the Short Forms of Leases Act, with a reservation in favour of the lessor of all mines and minerals on and under the land with a right to work the same, and containing a provision that the lessor might at any time, on giving the lessee 6 months' notice, determine the term, whereupon the lessor should pay to the lessee the fair value of any building erected on the land. E. erected upon the premises a brick building with a cement foundation. In 1913, E., being indebted to the plaintiff S., executed in his favour a deed of trust or assignment of her interest in the building, as security for the payment of her indebtedness, present and future, to him. Notwithstanding this assignment, E., in 1916, executed in favour of the defendant a chattel mortgage upon her interest in the building, describing it as a building situated on land belonging to the lessor. Subsequently E. made an assignment, under the Assignments and Preferences Act, for the general benefit of creditors, to the plaintiff M. In this action (brought within 60 days after the making of the chattel mortgage) the plaintiff S. asserted the priority of his security to the defendant's chattel mortgage, and both plaintiffs asserted that the chattel mortgage was void as against creditors:—

Held (RIDDELL, J., expressing no opinion, and FERGUSON, J.A., dissenting), that the building when erected became part of the land and passed to the lessor; it was not intended to be a trade-fixture or a chattel that might be removed; the instrument under which E. took an interest in the land was a lease, and not a license; the chattel mortgage conveyed nothing to the defendant; and any interest which E. had under the lease passed to M., subject to the claim of S. upon his security.

Judgment of MASTEN, J., the trial Judge, upon this branch of the case, affirmed. Upon the second branch of the case, the trial Judge found that the sum of \$2,500 was actually advanced by the defendant to E. at the time she made the chattel mortgage; he also found facts which brought the case within sec. 5 (1) of the Act, unless the advance was made *bonâ fide* within sec. 6 (1); but he did not find that the defendant took the impeached security with intent to defeat, hinder, or delay creditors, and he did not find that the security was not given in consideration of a present actual *bonâ fide* payment in money:—

Held (FERGUSON, J.A., dissenting), that the express findings were sufficient to negative the *bona fides* of the transaction, and that the defendant's security, upon the second ground also, had been successfully impeached.

AN action by Struthers & Co., creditors of Annie Essa, and by Martin, assignee for the benefit of creditors of Annie Essa, to have a chattel mortgage made by her to the defendant declared void as against them, and for other relief.

The action was tried by MASTEN, J., without a jury, at Haileybury.

G. S. Gibbons, for the plaintiffs.

H. H. Davis, for the defendant.

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June 15. MASTEN, J.:—The questions involved in this action relate first to the priority of the securities held respectively by the plaintiffs Struthers & Co. and by the defendant; and second, as between the plaintiff Martin and the defendant, to the validity of the security held by the defendant Chamandy.

The relevant facts are as follows:—

The Nipissing Mining Company Limited are the owners in fee of certain lots in Sudbury, known as numbers 76 and 78 according to a plan of part of mining location R.L. number 401, made by H. T. Routley, O.L.S.

On the 1st November, 1909, the Nipissing Mining Company leased these lots to one Annie Essa for the term of ten years computed from the 1st December, 1909.

On the premises is erected a building said by the witness Abraham Essa to have cost \$6,000, and to be owned by his wife Annie. The original leases are produced and form part of exhibit number 3. They contain no special provisions vesting the ownership of the building in the lessee. The leases are in special form, and are drawn so as to permit the lessor to continue its mining operations without hindrance, and to that end provide for cancellation of the lease by the lessor on 6 months' notice, in which case only the lessor is to pay the lessee the value of her buildings; but no other provision is made giving to the lessee any special rights in the buildings.

On the 10th September, 1913, the lessee, Annie Essa, being largely indebted to the plaintiffs Struthers & Co., gave to them, as collateral security for their debt, a declaration of trust, or assignment, of the above leases, by way of collateral security for payment of the debt. This document was duly notified to the Nipissing company, and the company's acknowledgment appears endorsed upon it (see exhibit number 3).

By this instrument, the lessee Essa covenanted and agreed to stand possessed of the lease and the said building on the said land in trust for Struthers & Co., with power to Struthers & Co. to sell and convey the same.

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There is a further provision in the instrument by which, "in case the said lease is terminated by the lessor according to the provisions thereof, before the end of the said term," all moneys which become due and payable to the lessee from the lessor shall be payable to Struthers & Co.

Notwithstanding this assignment, it was arranged by Abraham Essa, who was carrying on the business in his wife's name, that Annie Essa should execute a chattel mortgage to George Chamandy securing \$2,500. By this instrument Annie Essa purports to bargain, sell, and assign to George Chamandy, the mortgagee, all her interest in the buildings erected on the lands above described. This chattel mortgage appears to have been so executed by Annie Essa on the hypothesis that the building was her personal property.

The chattel mortgage is alleged by the plaintiffs to be invalid, on the ground that it was given and taken at a time when the mortgagor was insolvent, with intent to defraud, hinder, and delay Essa's creditors, and that it was preferential and within the purview of the Act respecting Assignments and Preferences by Insolvent Persons; and the evidence at the trial was largely directed to this controversy.

To this phase of the question I shall refer in a moment; but it appears to me that, whatever might be the conclusion on the question so raised, the defendant's chattel mortgage is ineffective because, under the terms of the lease from the Nipissing company to Annie Essa, the lessee had no title of any kind to the buildings forming the subject-matter of the grant in the chattel mortgage.

These buildings were fixtures erected on the lands of the Nipissing company; as such they became a part of the realty; and, in the absence of any provision in the lease varying that situation, they were the absolute property of the Nipissing company; and Annie Essa conveyed nothing whatever to the defendant by her chattel mortgage to him. The defendant admits that he knew that the Nipissing company owned the land. Whether or not the lease was valid, the fixtures belonged to the Nipissing company, and Chamandy took no interest. Even if Essa had some property in the building, it appears to me that the assignment of the lease to the plaintiffs Struthers & Co. is entitled to priority, under the circumstances above noted.

As between the plaintiff Martin and the defendant, if I am right in my view that the chattel mortgage is nugatory, the defendant has no security entitling him to any priority over other creditors; and the whole estate, including the residue of the term in the lands and buildings, passes to the assignee, subject to the charge in favour of Struthers & Co., but free of any claim on the part of Chamandy.

These conclusions suffice to dispose of the action; but, in case they do not commend themselves to an appellate tribunal, it may be desirable for me to state my findings of fact on the claim that the chattel mortgage is a fraud on other creditors.

The chattel mortgage under which the defendant claims is dated the 21st February, 1916, and the writ in this action was issued on the 7th April, 1916.* I find that on the 21st day of February, 1916, Annie Essa, the mortgagor, was insolvent and unable to pay her debts in full, and that she knew that she was insolvent. I find that the defendant George Chamandy was also well aware of such insolvency. And I find that the chattel mortgage in question was given with intent on the part of the mortgagor Essa to prejudice her creditors (including the plaintiffs Struthers & Co.), or to give a preference to certain of her creditors.

I find that Chamandy did advance to Essa \$2,500 at the time of his receiving the chattel mortgage in question, and I find the account given by the defendant and Essa regarding the giving of this security, and their statements that the defendant made this advance to Essa simply as an investment by Chamandy at 7 per cent. on satisfactory security, to be utterly unbelievable. The defendant belongs to that type of man whose motto is "business is business," which, being interpreted, means that no step is to be taken which does not advantage the taker financially. I am wholly unable to give credit to the story of the defendant that he withdrew from his own business one-quarter of his capital, reducing his holding in the firm of N. & G. Chamandy from \$8,000 to \$6,000, and invested it at 7 per cent., when his own statement is that in the business his capital had increased from \$8,000 to \$15,000 in three years; nor is it possible for me to believe that, if he were

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*The action was thus brought within 60 days after the making of the chattel mortgage: see the Assignments and Preferences Act, R.S.O. 1914, ch. 134, sec. 5 (3).

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withdrawing that sum from the business, he would invest it at 7 per cent. on a precarious security such as that which has been taken in the present instance. *

Nor can I believe that, when Essa was indebted to the defendant's firm in the sum of \$2,700, the defendant would advance to Essa \$2,500 without taking precautions to see that it was not employed in giving a cash preference to other creditors.

I find that it was not taken as a security investment; and I find also that it was not taken for affection or friendship; nor is it suggested that it was taken so as to acquire the ownership of the building mentioned in the security.

Notwithstanding the above views, I have difficulty in making a finding that the defendant, Chamandy, took the impeached security with intent to defeat, hinder, delay, etc., or in making a finding, under sec. 6 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134, that this security was not given in consideration of a present actual *bonâ fide* payment in money.* I strongly suspect that the defendant was a party to the wrongful intent; and that, though the \$2,500 was actually advanced, it was not *bonâ fide*; and that, in some way not disclosed, the defendant, or his firm of N. & G. Chamandy, gained some advantage; but it seems to me that a finding to that effect would be bottomed on suspicion rather than on evidence.

In the result, there will be judgment declaring that the security of the plaintiffs has priority over the security of the defendant, and that the plaintiff Martin in dealing with the estate should treat the defendant's security as nugatory.

The plaintiffs should have the general costs of the action, but there should be no costs to either party of that branch of the action which seeks to set aside the defendant's security under the statute respecting assignments and preferences.

The defendant appealed from the judgment of MASTEN, J.

*Section 5 (1) provides that, subject to the provisions of sec. 6, certain assignments and transfers shall be null and void as against creditors; and sec. 6 (1) provides that nothing in sec. 5 shall apply "to any *bonâ fide* sale or payment made in the ordinary course of trade or calling to an innocent purchaser or person; nor to . . . any *bonâ fide* conveyance, assignment, transfer . . . of any goods or property of any kind, which is made in consideration of a present actual *bonâ fide* payment in money. . . ."

March 5. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ., and FERGUSON, J.A.

G. H. Kilmer, K.C., for the appellant, argued that the instrument given by Annie Essa was a perfectly good and valid mortgage of her interest, whatever it was, and was not null and void, as held by the trial Judge. The instrument in her favour was in reality a license, not a lease, as under it she had not a right to exclusive possession, the grantor reserving an absolute right to retain possession of any part of the land, and not a mere mineral right. [RIDDELL, J., referred to *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405, and to *Devine v. Callery* (1917), 40 O.L.R. 505.] The instrument being a license, and also a grant, it is assignable, and a chattel mortgage is the proper form of conveyance: *Muskett v. Hill* (1839), 5 Bing. N.C. 694, at p. 707. If this was a license, it was not necessary to protect the interest by registration. The appellant also relies upon the proviso entitling the lessee to remove his fixtures, and is entitled to the benefit of the clause, apart from its statutory effect. The building may be considered a tenant's fixture. A stone-crusher would be a fixture, and why not a shop, which may be considered as the instrument with which the owner carries on his business? [RIDDELL, J., referred to *Whitehead v. Bennett* (1858), 27 L.J. Ch. 474, and *Foley v. Addenbrooke* (1844), 13 M. & W. 174, as being opposed to counsel's contention.] Reference was made to the cases collected in Shirley's Leading Cases, 9th ed., p. 109.

G. S. Gibbons, for the respondents, the plaintiffs, argued that the building could not be removed like a fixture, and that at most the defendant had only an equitable interest. A grant by Essa of the building is meaningless, as she had no interest in the building as such, but a mere possibility. The instrument could not be reformed in the interest of the defendant, by reason of the lack of good faith shewn by the evidence. The chattel mortgage was nugatory; but, if anything did pass by it, it was subsequent to Struthers & Co.'s claim. The evidence shews that the whole arrangement was a fraud upon creditors, the intent and effect of which was to hinder and delay them. [FERGUSON, J.A., said that the trial Judge had found against the plaintiffs on that ground, and they had not appealed.] We are entitled to support the judg-

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ment on any ground. We do not quarrel with the findings of the learned trial Judge on the facts, which are in our favour, but we say he should have drawn an inference from them which this Court is entitled to draw, viz., that the transaction was a fraudulent one.

Kilmer, in reply, argued that the trial Judge had found in the defendant's favour the fundamental fact that the advance of \$2,500 was a real one, and the onus was on the plaintiffs to prove affirmatively the absence of *bona fides*. He referred to *Gibbons v. Wilson* (1890), 17 A.R. 1, and *Campbell v. Roche* (1891), 18 A.R. 646.

March 25. CLUTE, J.:—Appeal by the defendant from the judgment of Masten, J., delivered on the 15th June, 1917.

The plaintiffs Struthers & Co., wholesale merchants, claim priority under a deed of trust given as security for their debt as against the defendant's chattel mortgage, and both plaintiffs claim that the chattel mortgage is void as against creditors.

The trial Judge gave effect to the first ground of the plaintiffs' claim, holding that nothing passed under the chattel mortgage; but did not expressly find fraud.

The facts are fully stated in the judgment below. The Nipissing Mining Company Limited is the owner of lots 76 and 78 in Cobalt, Routley plan 401, and on the 1st November, 1909, leased the same to one Annie Essa for a period of ten years, at a rental of \$375 a year, payable monthly.

The lease purports to be made under the Act respecting Short Forms of Leases, and is under seal, signed by both parties. It follows the usual form, reserving however all mines and minerals thereon and thereunder, with a right to work the same by the lessor; with a provision that the lessor may at any time, on giving the lessee 6 months' notice, determine the term, and "on the determination of the said term by said notice the lessor shall pay to the said lessee for any building erected on the land demised the fair value of such building." There is no other clause giving any right to the lessee in respect of any buildings erected thereon by her except the one allowing the said lessor to determine the term by notice. The lessee erected upon the premises a brick building with cement foundation, costing \$6,000. The evidence was conclusive that this was firmly annexed to the freehold, and could

not be removed as a building. It had a cement foundation and common party walls.

Annie Essa, being indebted to the plaintiff Robert Struthers in over \$2,000, on the 10th September, 1913, executed a deed of trust to the extent of her interest in the lease and building on the said premises, to secure Struthers for the said indebtedness, and it further provides that all proceeds realised from the sale of the said lease and the said building shall be paid over to said Struthers to be applied on account of the said indebtedness: she further covenants to assign the said lease, upon request, to any person named by Struthers, and authorises him to transfer the said lease and the right to the said building as he may see fit, for such consideration as he shall deem just; the consideration to be applied upon the said indebtedness. It also provides that, in case the lease is terminated by the lessor according to the provisions thereof, before the end of the term, all moneys which become due and payable to the lessee shall be payable to Struthers, and she thereby "absolutely assigns her interest in the said moneys" to him, and authorises him to collect the same, and to give all necessary releases and discharges as her attorney or otherwise. The trust deed also provides that, upon payment of the indebtedness present and future, by the said Annie Essa to the plaintiff Struthers, he will execute a release of the declaration of trust, and it further declares that the trust is given and taken as collateral security only for the payment of the indebtedness, present and future, by Annie Essa to the plaintiff Struthers.

Notwithstanding this assignment, Annie Essa executed a chattel mortgage, dated the 26th February, 1916, and registered on the same day, to George Chamandy, of all and singular "her, the mortgagor's, interest in that certain building situate in the town of Cobalt aforesaid and known and described as Nos. 40 and 42 Lang street, Cobalt; said building being situate on land belonging to the Nipissing Mining Company Limited." The consideration is said to be \$2,500. The mortgage is drawn in the usual form, and the word "building" is used throughout instead of the usual phrase "goods and chattels."

The learned trial Judge held that, irrespective of the question of *bona fides*, the chattel mortgage was ineffective, because, under the terms of the lease from the Nipissing Mining Company Limited

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to Annie Essa, the lessee had no title of any kind to the building forming the subject-matter of the grant in the chattel mortgage. The building was a fixture, erected on the land of the Nipissing company, and as such became part of the realty; and, in the absence of any provision in the lease varying that situation, the building was the absolute property of the Nipissing company, and Annie Essa conveyed nothing whatever to the defendant by her chattel mortgage to him; and, even if Essa had some property in the building, the learned trial Judge was of the opinion that the assignment of the lease to the plaintiff Struthers is entitled to priority under the circumstances; that the chattel mortgage is nugatory; the defendant has no security entitling him to any priority over other creditors; and the whole estate, including the residue of the term in the lands and buildings, passes to the assignee, subject to the charge in favour of Struthers & Co., but free of any claim on the part of Chamandy.

These conclusions, the trial Judge says, suffice to dispose of the action; but, in case they do not commend themselves to the appellate tribunal, he makes certain findings of fact on the claim that the chattel mortgage is a fraud on other creditors. He finds that on the date the chattel mortgage was given, viz., the 21st February, 1916, Annie Essa, the mortgagor, was insolvent and unable to pay her debts in full; that she knew that she was insolvent; and that George Chamandy also well knew of such insolvency; and that the chattel mortgage in question was given with intent on the part of the mortgagor to prejudice her creditors, including the plaintiff Struthers, or to give a preference to certain of her creditors. The learned trial Judge finds that Chamandy did advance to Essa the \$2,500 at the time of receiving the chattel mortgage in question. But that the account given by the defendant and Essa regarding the giving of this security and their statements that the defendant made this advance to Essa simply as an investment by Chamandy at 7 per cent. on satisfactory security, were utterly unbelievable; he is wholly unable to credit the story of the defendant, that he withdrew from his own business one-fourth of his capital to make this investment; and it is impossible for him to believe that, if the defendant were withdrawing that sum from his business, he would invest it at 7 per cent. upon a precarious security such as that of the chattel mortgage. Nor does

he believe that, when Essa was indebted to the defendant's firm in the sum of \$2,700, the defendant would advance Essa \$2,500 without taking precautions to see that it was not employed in giving a cash preference to other creditors. He further finds that the chattel mortgage was not taken as a security investment, that it was not taken for affection or friendship as suggested, nor is it suggested that it was taken so as to acquire the ownership of the building.

Notwithstanding these findings as to the nature of the transaction, he feels difficulty in making a finding "that the defendant Chamandy took the impeached security with intent to defeat, hinder, delay," etc., or in making a finding under sec. 6 that this security was not given in consideration of a present actual *bonâ fide* payment in money. "I strongly suspect that the defendant was a party to the wrongful intent; and that, though the \$2,500 was actually advanced, it was not *bonâ fide*; and that, in some way not disclosed, the defendant, or his firm . . . gained some advantage; but it seems to me that a finding to that effect would be bottomed on suspicion rather than on evidence."

Mr. Kilmer argued: (1) that the chattel mortgage was valid, whether of land or of chattel, and is not void, as found by the trial Judge; (2) that the instrument under which Annie Essa took some interest in the land in question was not a lease, but a license; and that, it being a license, a chattel mortgage is a proper conveyance of this building, and has priority over the plaintiffs' security.

I am unable to give effect to either of these views. The evidence is conclusive, and indeed not disputed, that the building erected by Annie Essa upon the property leased is a substantial brick building with cement foundations and firmly cemented to the natural rock, and could not be removed as a building. The walls are held in common as party walls, and it was conceded that only a portion of the material could be removed, even if the building were taken down.

I entertain no doubt that the building became part of the land and passed to the lessor, and that it was not intended to be a trade-fixtue or a chattel that might be removed under any circumstances. This is apparent from the substantial nature of the building and its firmly attached foundations. This view, I think, is put beyond question by the provision in the lease giving the

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right to the lessor to terminate the same upon 6 months' notice and payment of the value of the building, having regard to all the circumstances.

In the Short Forms of Leases Act, R.S.O. 1914, ch. 116, schedule B., column 1 (10), the provision "that the lessee may remove his fixtures" does not cover buildings, but refers to trade-fixtures or other articles upon the premises, and provides that the lessee on such removal shall do no damage to the premises. It is plain, I think, that the building cannot be regarded as a fixture within the terms of the lease: see also *Whitehead v. Bennett*, 27 L.J. Ch. 474, where it was held that buildings of brick with brick foundations let into the soil, although erected for the sole purposes of trade, cannot be removed by the tenant; see also *Foley v. Addenbrooke*, 13 M. & W. 174; *Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335; Halsbury's Laws of England, vol. 18, p. 423.

The chattel mortgage does not purport to assign the lease or right under the provision for the payment for the building in case of notice. The building, being a part of the freehold, was vested in the Nipissing Mining Company. The declaration of trust was filed in the Nipissing land office on the 18th September, 1913, and was acknowledged by the Nipissing Mining Company Limited.

It is clear, I think, that nothing was intended to pass by the chattel mortgage except the building; and, the instrument being ineffective to pass it, it was, as the trial Judge said, wholly nugatory; there was no property upon which it could operate. The possibility of Annie Essa being entitled at some future time to compensation for the building, in case the term was ended by the lessor, passed with all rights thereunder to the plaintiff Struthers.

It was argued that, because the trust instrument was a security only, any surplus would belong to Annie Essa, and this might have passed by the chattel mortgage. She would indeed be entitled to any such possible surplus, but the chattel mortgage does not purport to convey, and did not convey, to the defendant, this right under the lease or the right to receive the same; the right to the surplus, if any, passed to her assignee, Martin.

The alternative suggestion that the instrument from the Nipissing Mining Company is a license, and not a lease, is not, I think, tenable. The document itself is the answer to this argument; it does not purport to be a license; it is a lease, with a reservation of the mineral rights and the right to work them.

Mr. Kilmer referred to *Muskett v. Hill*, 5 Bing. N.C. 694, at p. 707, and to *Devine v. Callery*, 40 O.L.R. 505. These cases do not lend support to his argument in the present case.

While I agree with the trial Judge upon the ground upon which he disposed of the case, I think it proper also to deal with the question with respect to the *bona fides* of the advance of \$2,500 by the defendant. The assignee for creditors is before the Court. The question is distinctly raised by the plaintiff. The facts are fully in evidence, and the question ought to be pronounced upon in the interests of the plaintiff and the other creditors of Annie Essa.

A perusal of the evidence satisfies me that the findings of the learned trial Judge are fully supported by the evidence. No doubt, a cheque was actually given by the defendant, and endorsed by Annie Essa, and passed through the bank. I think that the evidence and findings create more than a suspicion of fraud against the defendant. Taking his own evidence as to the circumstances under which he made the alleged advance, the story is incredible. The defendant is partner in the firm of N. & G. Chamandy Brothers; he travels for the firm.

On the 20th February, the day before the chattel mortgage was given, he was in Cobalt. Annie Essa at this time owed the firm \$900, and was indebted to a partner of the firm for \$1,500. The defendant says he just dropped into Essa's place to try and sell some goods. He says he had not seen Abraham Essa (the husband of Annie Essa, who carries on the business for her) for three or four months before that. Essa asked him to lend \$2,500 on a chattel mortgage on the building; he understood that it was to be a chattel mortgage, and that Essa did not own the land. He says he telephoned to Haileybury and ascertained that there was no mortgage upon the building; and, without asking to see the lease or anything further, he made the advance; that nothing was said about any portion of the advance being applied on the amount due the firm or his brother; but, upon the chattel mortgage being signed, he gave a cheque. He was asked why he did not take a land mortgage; he said because the land was not his, that is, Essa's. The cheque was signed by the defendant, and not in the name of the firm. The defendant had no account at the bank—the firm had. His capital in the firm was \$8,000. It was thus reduced to \$5,500,

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by a loan to a person already indebted to the firm and to one of the members of the firm in nearly the full amount so advanced, without one word being said that any portion of these accounts should be paid out of the advance. He thus invested one-fourth of his capital in a building, knowing that the mortgagor did not own the land, without asking to see the lease and without advice.

Abraham Essa had formerly carried on the business. He made an assignment in 1911; his wife bought the business for 50 or 55 cents on the dollar. An extension of time was obtained by Annie Essa, and she made an assignment a few days after the chattel mortgage was given.

It is true that in cases of fraudulent conveyances the burden of proof is upon those who seek to set aside the deed: May on *Fraudulent Conveyances*, 2nd ed., p. 84; Halsbury's *Laws of England*, vol. 15, p. 84, para. 173; *In re Johnson, Golden v. Gilman* (1881), 20 Ch. D. 389, 394, 51 L.J. Ch. 154, affirmed by the Court of Appeal (1882), 51 L.J. Ch. 503; see *per* Baggallay, L.J., at p. 504.

These decisions are under the English statute, which does not prohibit the debtor preferring one creditor to another; and so the conveyance executed in favour of one or some only of the creditors of the grantor may be *bonâ fide* and valid, notwithstanding that the grantor knew at the time that an execution was due to be issued against him or that he is insolvent: Halsbury's *Laws of England*, vol. 15, pp. 83, 84, para. 172, and cases there cited.

But, even under the English Act, it is said that where the natural consequence of the alienation is to delay, hinder, or defraud creditors, or that the circumstances under which the alienation is effected bear one of the indications or badges of fraud, the onus of upholding the alienation is imposed on the defendants: Halsbury, vol. 15, p. 84, para. 173.

Our Assignments and Preferences Act, sec. 5 (1), provides that, subject to the provisions of sec. 6, every assignment etc. made by a person at a time when he is in insolvent circumstances or unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice his creditors, shall, as against the creditor or creditors injured, delayed or prejudiced, be null and void.

The findings of the learned trial Judge bring the case expressly

within this section, unless the advance was *bonâ fide*; and, in my opinion, having regard to the facts and the findings of the learned trial Judge, while the advance was in fact made, it was not *bonâ fide*. The defendant having knowledge of the insolvency of Essa, and having regard to all the circumstances, it is, in my opinion, incredible that the defendant made the advance *bonâ fide*; the trial Judge in fact, in my opinion, negatives the *bona fides* of the transaction in his findings, for he expressly finds that the chattel mortgage "was not taken as a security investment; . . . that it was not taken for affection or friendship; nor is it suggested that it was taken so as to acquire the ownership of the building mentioned in the security."

In these cases it is seldom possible to give positive proof of intentional fraud; that is seen in the transaction and from the surrounding circumstances; and in this case I entertain no doubt that it was a fraudulent transaction; and the chattel mortgage, whether of any worth or worthless, should be declared void as against the creditors of Annie Essa.

To this intent the form of the judgment may be amended, and the appeal dismissed with costs.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed with CLUTE, J.

RIDDELL, J.:—Mrs. Essa, who was in business in Cobalt, became indebted to the plaintiffs Struthers & Co., a wholesale firm in London. She gave them as security for her debt a declaration of trust in a certain lease; thereafter she made a chattel mortgage to the defendant Chamandy of the lease; and subsequently made an assignment for the benefit of creditors to the plaintiff Martin.

Struthers & Co. and Martin bring an action to have the chattel mortgage declared void as against them; Mr. Justice Masten, before whom the action was tried, gave judgment in their favour; and the defendant appeals.

As to Struthers & Co., there can be no real defence; and I think the defence fails as to Martin as well. The Assignments and Preferences Act, R.S.O. 1914, ch. 134, by sec. 5 (1), provides that every conveyance of any property by a debtor in insolvent circumstances, with the intent to delay creditors, is null and void; this has an exception in sec. 6, providing that it shall not apply to a

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bonâ fide conveyance made in security for a present actual *bonâ fide* advance of money.

The defendant claims that the transaction comes within the exception. Of course, claiming an exception to a general rule, given in a subsequent section, the onus is upon him to prove that he comes within the exception: *Thibault v. Gibson* (1843), 12 M. & W. 88, 94.

No doubt, when it was proved that the sum of \$2,500 was actually advanced at the time of the transaction, the defendant made out a *primâ facie* case—the advance is actual, and *bona fides* is always presumed. Where money is actually advanced, there must be some cogent evidence of *mala fides*, i.e., of intent to defraud: *McDonald v. Doran* (1908), 12 O.W.R. 1151; *Stecher Lithographic Co. v. Ontario Seed Co.* (1910-12), 22 O.L.R. 577, 24 O.L.R. 503, 46 S.C.R. 540, 7 D.L.R. 148. The mere actual advance is not in itself enough to save the transaction; accompanying *mala fides* will destroy the protection.

Considerable difficulty has arisen in certain cases from a too literal interpretation placed upon judicial language; but the whole trend of decision shews that what is to be considered is the real essence of the transaction.

Is the real transaction a loan of money and security given for the loan? If so, the lender has no concern with what the borrower does or intends to do with the money: *Campbell v. Roche*, 18 A.R. 646; *Campbell v. Patterson* (1892), 21 S.C.R. 645; *Gibbons v. Wilson*, 17 A.R. 1; *Ex p. Stubbins* (1881), 17 Ch. D. 58; he may intend to the knowledge of the lender to take it out of the country as an absconding debtor: *Hall v. Kissock* (1853), 11 U.C.R. 9; or to pay some only of his creditors: *Langley v. Beardsley* (1909), 18 O.L.R. 67; May on Fraudulent Conveyances, 3rd ed., pp. 62, 63.

But, if the transaction be a scheme to defeat, delay, or defraud creditors, and the advance but a means to carry out the scheme, the conveyance will be void—the advance is actual, but not *bonâ fide*.

The distinction between the two cases, while in a sense metaphysical, is real and substantial.

If the borrower says, "Come, lend me some money and I will give you security," and the real transaction is just that, the security is good; but, if the borrower says, "Come help me to delay

my creditors, and for that purpose make me a loan," the security is bad. Nor is it necessary that such words should be used—they seldom would be used.

In the present case the learned trial Judge finds against the advance being a real loan; his language, fully justified by the evidence, is:—

"I find that Chamandy did advance to Essa \$2,500 at the time of his receiving the chattel mortgage in question, and I find the account given by the defendant and Essa regarding the giving of this security, and their statements that the defendant made this advance to Essa simply as an investment by Chamandy at 7 per cent. on satisfactory security, to be utterly unbelievable . . . I find that it was not taken as a security investment; and I find also that it was not taken for affection or friendship; nor is it suggested that it was taken so as to acquire the ownership of the building mentioned in the security."

While my learned brother does not in terms find that the lender had the intent to delay, etc., he has excluded all possible alternatives that can be suggested. If there was some occult good reason for making the advance, it is not too much to ask the defendant to say what it is—none has been suggested.

I think the express findings, however, sufficient to dispose of the proposition that the transaction was a *bonâ fide* loan.

The appeal should be dismissed with costs.

FERGUSON, J.A. (dissenting):—In their statement of claim the plaintiffs allege two grounds of attack (para. 9): (1) that there was no advance; (2) that the advance was made with intent to defeat, hinder, and delay.

The learned trial Judge has found an actual advance. That in itself raises a presumption of *bona fides*, requiring proof of actual intent to defraud: see Cassels on the Ontario Assignments Act, 4th ed., p. 49, and cases there collected. The learned trial Judge has not found fraud. To do so, he says, would be to bottom his judgment upon suspicion and not upon evidence. True, he does not accept the defendant's reasons for making the advance; but I cannot agree that it follows from a refusal to accept as true the reason given by the defendant for making the advance, that the real reason or purpose was of necessity fraudulent. It may well

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be that, though the defendant, for some undisclosed purpose, has not truthfully stated his actual reason for making the loan, his reason for not making a truthful statement may not be in any way connected with his honesty in making the loan. Or, on the other hand, some third party may have asked him to make the loan; and it is just as reasonable to infer from the evidence that he made the loan because of that request, and a feeling that that person would see he did not lose, as it is to infer that he made the loan in pursuance of a fraudulent scheme, or for the purpose of defeating, hindering, or delaying creditors.

In my opinion, the learned trial Judge has in his finding gone as far as the evidence warranted, and, if guided by the written testimony only, further than I would feel justified in going. The trial Judge gives, as his reason for not accepting the statement of the defendant, his appearance, his demeanour, his general manner and purpose in doing business, and the improbability of his actually drawing the money out of his business. These, I think, would be better reasons for concluding that no advance was made than for concluding that the advance, though actually made, was made to defraud the debtor's creditors.

For these reasons, I, on the question of intent, agree with the conclusions of the learned trial Judge.

It is well settled by authority that the status of a creditor to impeach a conveyance is founded on the allegation that property *exigible in execution* has been by the conveyance taken out of the reach of creditors: *Blakely v. Gould* (1897), 24 A.R. 153, 27 S.C.R. 682; *Osler v. Muter* (1892), 19 A.R. 94. Yet, because the learned trial Judge was of opinion that *no* property passed by the conveyance attacked, it is, by the formal judgment entered in this creditor's action, declared that the conveyance is wholly null and void: the document may confer valuable rights without transferring property exigible in execution; and I cannot agree with the learned trial Judge in his conclusion that the document is a nullity; it is dated the 21st February, 1916, and takes the form of a chattel mortgage under seal. By it the debtor, in consideration of \$2,500 (found by the learned trial Judge to have been actually advanced) "doth grant, bargain, sell, and assign all and singular her interest in the certain building situated in the town of Cobalt, on the lands and premises

known and described as Nos. 40 and 42 Lang street, Cobalt, said building being situate on land belonging to the Nipissing Mining Company Limited."

This grant is followed by the usual proviso for redemption and by a number of covenants and provisoes, including a covenant by the debtor to repay the \$2,500 mortgage moneys and interest according to the proviso for redemption, also to insure the buildings for the benefit of the defendant, and by other covenants intended better to secure the repayment of the \$2,500 and interest. These covenants and provisoes are followed by a declaration that the creditor hath put the debtor in full possession, and the document contains provisoes allowing the debtor to retain possession under the creditor, while she performs her covenants, etc.

The terms of the lease under which the debtor held the land on which the building stands has yet some years to run. The landlord is not a party to this litigation; but, so far as there is any evidence before the Court, the landlord does not claim the building; still the learned trial Judge has concluded that, because, in his opinion, this building is so attached to the land as not to be removable without injury to the freehold, it is the property of the landlord, and consequently nothing passed under the grant, and that for this reason the deed of grant is a nullity and the security null and void. I cannot think that these results necessarily follow from the finding that the building is attached to the freehold, and the lease gives no right to remove it. The conclusion that the building is the exclusive property of the landlord is based upon a presumption of law; but it may well be that the landlord, if the question ever arises, will concede the tenant's claim of ownership, or a right in her to remove or demolish the building; but, if the landlord does not do so, yet it seems to me that the debtor had, at the date of the grant, a right of occupation and an insurable interest in the building, also a right to be paid for the building in case the landlord interfered with her use, which rights and interest clearly passed under the document of conveyance. Again, even if it be taken as established that nothing passed under the grant, it does not follow that the document as a security is a nullity, and should be set aside. The covenants and agreements therein should stand for what they are worth, so as to establish as against the assignee of the debtor a claim on the insolvent estate.

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The plaintiff Struthers' assignment is admitted to be only a security; and it was on the argument conceded that the appellant's rights, if any, were subject to the prior security of the plaintiff Struthers.

In my opinion, the judgment below should be varied, and it should be declared:—

(1) That the security of the plaintiff Struthers, in the pleadings mentioned, is entitled to priority over the security of the defendant.

(2) That whatever interest or right the debtor had in the building, including her insurable interest, and the right to enjoy possession of the building on the demised premises, and her right, if any, to claim against the landlord to be paid for or to remove or demolish the building, passed under the grant to the defendant, and that the security of the defendant is a valid and subsisting security for the sum of \$2,500 and interest.

(3) That the appellant should have the costs of this appeal and action, *excepting* in so far as these costs were increased by reason of the question of the priorities between the plaintiff Struthers and the defendant. The costs of this issue the plaintiff Struthers should have as against the defendant.

Appeal dismissed; FERGUSON, J.A., dissenting.

[APPELLATE DIVISION.]

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Mar. 25.

ROBINSON v. LONDON LIFE INSURANCE CO.

Insurance (Life)—Application for Insurance Made and Premium Paid—Powers of Local Agent—By-laws of Insurance Company—Principal Officers—Approval of Application by Medical Referee—Death of Applicant before Acceptance of Application by Issue of Policy or otherwise—Failure to Prove Contract—What Constitutes a Contract—Insurance Act, R.S.O. 1914, ch. 183, secs. 2 (14), 155.

C. was a local agent of the defendants; his powers were limited to receiving applications and premiums for insurance and procuring medical examination of applicants. R., on the 3rd February, signed an application, addressed to the defendants, for an insurance on his life, and gave it to C. with \$5 and a promissory note for \$3.62—\$8.62 being the estimated amount of the first quarter's premium. An interim receipt, signed by C., was given by him to R. C. intimated and R. understood that a larger premium might be required. At the instance of C., R. was examined by a physician on the same day. C. sent the application, the \$5, and the note to the defendants. On the 6th February, the defendants returned the application and the note to C., stating that the premium would be \$9.37, instead of \$8.62, and asking C. to have the necessary changes made and initialled by the applicant. The application and note were altered by C. and sent to R. to be initialled, but were not at once returned by R. On the 10th February, the medical examiner's report was received by the defendants. On the 24th February, R.'s wife brought to C. the application and note as altered, duly initialled; and she paid to C. in cash \$4.37, the balance of the premium. On the same day, which was a Saturday, C. sent the application and the \$4.37 to the defendants; they received it on the 26th; but R. was then dead, his death occurring on the 25th. On the 28th February, the defendants were notified of the death. The policy had been prepared, but had not been signed or sealed. The defendants sent a cheque for \$9.37, the sum paid, to the wife of R., who refused to accept it; it was retained by her solicitors, without prejudice to her claim to recover as upon a completed contract of insurance, to enforce which she brought this action:—

Held, upon the evidence, and having regard to the limited powers of C. and the by-laws of the defendants, which provided that the manager, assistant-manager, and acting-manager were the only officers empowered to bind the defendants by an insurance contract, and that they could do so only after the application has been approved by the medical referee—who in this case never saw the application until after the death of R.—that there never was any insurance contract between the defendants and R.

Per MULOCK, C.J.Ex.:—A policy is evidence of a contract, but is not itself the contract. The contract may be by parol, in which case there is no policy to submit to the applicant for acceptance or refusal. The application is an offer, and may be accepted by any sufficient corporate act—not necessarily the granting of a policy. Sections 2 (14) and 155 of the Insurance Act, R.S.O. 1914, ch. 183, referred to.

The *dictum* of RIDDELL, J., in *Sharkey v. Yorkshire Insurance Co.* (1916), 37 O.L.R. 344, at p. 352, repeated in this case, that the ordinary application for insurance is not a tender which will become a contract, but a request to the company to offer a policy, that, if the company tender a policy on such request, the applicant may decline to accept it, and that, if the applicant accept the policy tendered, then and only then is the contract complete, not assented to by MULOCK, C.J.Ex.

AN appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, in favour of the plaintiff, the

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widow of J. E. Robinson, deceased, for the recovery of \$1,000, the amount of an alleged insurance by the defendants on the life of the deceased.

The defendants denied that there was any insurance contract with the deceased subsisting at the time of his death or at any time.

March 5 and 6. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ., and FERGUSON, J.A.

J. M. McEvoy and *E. Jeffery*, for the appellants, stated that the material facts were not in dispute, and the question at issue was, whether or not, upon these facts, there was an insurance contract between the plaintiff's husband and the defendants. Although the first quarterly premium had been paid, and the policy had been actually prepared, it had not been executed by the defendants; and, at the time of the death of the husband, there was no obligation upon the defendants to issue the policy and carry out the insurance. Counsel referred to *Sharkey v. Yorkshire Insurance Co.* (1916), 37 O.L.R. 344, 28 D.L.R. 191, affirmed 54 S.C.R. 92, 32 D.L.R. 711; *Donovan v. Excelsior Life Insurance Co.* (1916), 53 S.C.R. 539, 31 D.L.R. 113; *Canning v. Farquhar* (1886), 16 Q.B.D. 727, 730.

C. W. Bell and *T. B. McQuesten*, for the respondent, the plaintiff, argued that a contract did exist between the defendants and the deceased by reason of the *consensus* arrived at on the 24th February, when the plaintiff, at her husband's request, gave the defendants' agent the application and note, with the changes initialled, paid him the amount of the note, and got from him a receipt for the balance of the quarterly premium. The cases cited on behalf of the appellants are distinguishable, as the circumstances differed in important respects. In the *Canning* case the premium had not been paid; and, before it was tendered, there was a material alteration in the health of the proposed insurer. *Penley v. Beacon Assurance Co.* (1859), 7 Gr. 130, was a case in which an insurance company were held liable before the actual delivery of the policy. The contract in this case was formed, and the defendants' liability began, when the application, which had been returned for the sole purpose of having the required alteration made, was altered as required, and the additional premium paid to the defendants' local agent. There was nothing upon which the signing officer was required to exercise a discretion before performing the merely

clerical act of affixing his signature. The corporate action would necessarily follow the acceptance of the risk, its approval by the medical officer, and the payment of the premium. The defendants are not entitled to set up their own internal regulations in order to defeat a claim of this nature.

McEvoy, in reply.

March 25. MULOCK, C.J. Ex.:—This is an appeal from the judgment of Falconbridge, C.J.K.B., in favour of the plaintiff for \$1,000 and costs.

The plaintiff is the widow of J. E. Robinson, and brought this action to recover the amount claimed to be due her by virtue of an alleged life insurance contract in her favour, made by the defendant company with the said Robinson.

There is no material dispute as to the following facts and circumstances.

The defendants are a life insurance company, having their head office at the city of London, and one J. D. Calvert was their local agent at the town of Preston to receive applications for insurance and insurance premiums and to procure medical examination of applicants for insurance therein.

On the 3rd February, 1917, Robinson made a written application to Calvert, at Preston, for insurance on his life for \$1,000, and paid to him at the time, in cash, the sum of \$5, and delivered to him his promissory note for \$3.62, payable on the 20th February, 1917, making together the sum of \$8.62, the estimated amount of the first quarter's premium, and Calvert gave to Robinson a receipt for the money in the following words and figures:—

“The London Life Insurance Company,

“Head Office, London, Ont.

“February 3rd, 1917.

“Interim Receipt.

“Received from Mr. J. E. Robinson \$5.00, which is a payment on account of first year's premium on insurance of \$1,000.00 for which application has this day been made in the above named company. No obligation is incurred by said company by reason of this payment unless said application is accepted and a policy granted.

“J. D. Calvert,

“Agent.”

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Then follows a foot-note in the following words: "Unless you receive your policy or money is returned within 60 days from the date of this receipt, please notify the company, giving the name of agent, the amount paid, and the date when paid."

At this time, Robinson was engaged as a furnace-man at certain steel works, and Calvert explained to him that the company might regard his occupation as hazardous, and in consequence require payment of a larger premium, and Robinson fully understood that he might be required to pay a larger premium.

Robinson resided some distance from Preston, and was anxious to undergo medical examination before going home. The company's medical examiner at Preston being absent, the examination was made by another physician, appointed for such purpose by Calvert. On the same day, Calvert forwarded the application, the \$5, and the note, to the company, enclosed in his letter worded as follows:—

"Preston, February 3rd, 1917.

"The London Life Insurance Co.,

"London, Ont.

"Dear Sirs:

"I am forwarding application for \$1,000 from Mr. J. E. Robinson, of Hamilton, together with \$5.00 and note for \$3.62. I may say that I have taken it upon myself to have the examination made by Dr. Hogg, of Preston. Mr. Robinson was visiting Preston and had to return to Hamilton shortly after he signed the application. Our Dr. Oakes was out of town and not expected back until 7.30. Dr. Buchanan, of Galt, was also out and I could not get an idea as to the time he would get back. As the applicant lives out of Hamilton on rural route, he said he would prefer examination made whilst in Preston, with the result that Dr. Hogg is the examiner. I trust this is satisfactory, seeing that Mr. Robinson did not make the request to have a special doctor.

"Yours truly,

"J. D. Calvert."

On the 6th February, the company sent the application with the following letter to A. J. Arnold, of Kitchener, their district agent:—

"Dear Sir: *Re James E. Robinson.*

"We are returning this application, as the occupation calls for

an extra premium of \$3.00, if this man is working on a blast furnace. For information we would refer you to p. 347 of your manual. Kindly have the necessary changes made and initialled by the applicant.

"Yours truly,

"H. R. Laurie,

"Asst. Actuary."

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Arnold evidently communicated the tenor of this letter to Calvert, for on the 8th February, 1917, he wrote to Robinson as follows:—

"J. E. Robinson, Esq., Hamilton, Ont.

"Dear Sir: I have been notified by the company that the nature of your occupation calls for an extra premium of 75c. per quarter, 13 weeks. I am forwarding the application which you signed, for your initials, as the quarterly payment will be \$9.37, instead of \$8.62. You will notice the alterations I have made and if you will kindly put your initials 'J.E.R.' between the crosses we need not have another application signed. The balance of first quarterly payment will be \$4.37 due 20th inst. as per your note, which also requires your initials 'J.E.R.' I shall be glad to have the note and application returned in enclosed envelope at your earliest convenience. Trusting you will find this satisfactory, we remain,

"Yours truly,

"J. D. Calvert."

It does not appear when the medical officer's report was sent to the company, but at the trial it came from the company's custody, and had stamped thereon the words: "Received main office, February 10th, 1917. Answered."

On the 24th February, Mrs. Robinson, the plaintiff, at her husband's request, came to Calvert's office at Preston, bringing and delivering to Calvert the original application and note, with the changes initialled as suggested by Calvert. She then paid to Calvert \$4.37, the amount of the amended note, which Calvert then delivered up to her, and at the same time he gave her a receipt for the \$4.37, worded as follows:—

"Preston, February 24th, 1917.

"Received from Mrs. Robinson the sum of \$4.37, being balance of quarterly premium for application for \$1,000 insurance from London Life Ins. Co.

"J. D. Calvert."

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On the same day, the 24th February, Calvert sent the amended application, together with the \$4.37, to the company, accompanied by a letter in the following words:—

“Preston, February 24th, 1917.

“The London Life Insurance Co.

“Dear Sirs: I forward herewith application from Mr. Robinson. The premium alteration has been initialled, which I trust is in order. Please find order for \$4.37, being balance of first quarter’s premium.

“Yours truly,

“J. D. Calvert.

“P.S. I have returned the note to Mr. Robinson for balance paid.”

At the trial Mrs. Robinson testified that at the interview of the 24th February, Calvert assured her that the application had been passed, and that the receipt was as good as a policy. Calvert denies having so spoken. His version is: “I said to Mrs. Robinson, ‘The application appears to be in order, and if the company accepts the life and the policy is issued, I will see that it is delivered immediately.’”

Calvert had only at that interview received the altered or new application, and it was still in his hands. It had not been passed, and it is improbable that he gave Mrs. Robinson any such assurance. Even if he did, it was contrary to the facts and was unauthorised, and Calvert could not on behalf of the company make an insurance contract on Robinson’s life.

On Sunday the 25th February, Robinson died. On the following day, the company received the amended application and the \$4.37, and certain clerks in the company’s employment then proceeded as a matter of routine to prepare the policy. On the 27th February, Calvert received a telegram from Mrs. Robinson informing him of her husband’s death, and on the same day he wrote the company informing them of the death.

This letter was received by the company on the 28th February. Up to this time the proposed policy had not been signed or sealed by the company or any of its officers, and one of the clerks who had been engaged in the preparation of the policy, on learning of Robinson’s death, destroyed the intended policy. Subsequently the premium which had been paid was returned by cheque to Mrs. Robinson, who then consulted her solicitors. They then returned

the cheque to the company, who sent it back to the solicitors, and they, without prejudice, retained it, and commenced this action.

The defence is, that no contract had been entered into between the company and Robinson, and that is the question now to be determined. If there was no contract before Robinson's death, nothing that happened thereafter could create one, for a contract cannot be made with a dead man.

The plaintiff contends that, when Robinson delivered his first application and paid the \$5, it was understood that, upon accepting the application, the company might charge an additional sum on account of the premium; that, on receipt of the application, the company's officials notified their agent that the application had been accepted, provided that Robinson paid a quarterly premium of \$9.37 instead of \$8.62; that the agent so notified Robinson and requested payment of the additional sum; that, on the 24th February, Robinson complied with such request; and that thereupon the contract arose.

There is no evidence to support any of these contentions. According to the evidence, there was no understanding on the part of the company that on accepting the application it might charge an additional sum, or that the company's officials, on receipt of the application, notified the agent that it had been accepted, either conditionally or otherwise, or that the agent notified Robinson of any such alleged acceptance or demanded payment of the additional amount. Even if Calvert, on receipt of the first application and first payment, had given to Mrs. Robinson the alleged assurance, it would have been of no avail, for he was an agent of limited authority, simply to receive applications and premiums. According to the company's by-laws, the manager, assistant-manager, and acting manager are the only officers empowered to bind the company by an insurance contract, and they can do so only after the application has been approved by the medical referee. In this case it was not approved by that officer until the 27th February. Until then no one had power to bind the company by an insurance contract; and, Robinson having died two days previous to such approval, it was impossible for a contract to have existed.

The true interpretation to place upon the occurrences is, I think, as follows:—

On receipt of the application, Calvert informed Robinson that

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his occupation, being of a hazardous nature, might call for an increased premium; that, when the application reached the company's office, it first went to the actuarial office, and, it there being discovered that the amount of premium mentioned in the application was not in accordance with the company's tariff of rates, the assistant actuary sent the application to the district agent, calling his attention to the tariff. That officer apparently communicated the information to Calvert, and he made the necessary changes in the application and in the promissory note, and sent them to Robinson. The latter, agreeing to the increased rate, initialled the changes and returned the altered application and note by his wife to Calvert. The first application was a proposal for insurance at a certain rate. This the company in effect refused to accept. What subsequently happened may be regarded as a counter-proposal, and the amended application became in fact a new application or proposal, and was not accepted by the company prior to Robinson's death.

I therefore am of opinion that there never was any insurance contract between the company and Robinson.

My learned brother Riddell in his judgment in this case observes that in *Sharkey v. Yorkshire Insurance Co.*, 37 O.L.R. 344, 28 D.L.R. 191, affirmed in the Supreme Court, 54 S.C.R. 92, 32 D.L.R. 711, it was pointed out that the ordinary application for insurance is not a tender which will become a contract, but a request to the company to offer a policy; that, if the company tender a policy on such request, the proposed assured may decline to accept it. "If the assured accept the policy tendered, then and only then the contract is complete." 37 O.L.R. at p. 352: see the cases cited. The Supreme Court affirmed the judgment of the Appellate Division, but none of the Judges appear to have expressed any opinion in regard to the proposition above quoted.

The Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 2 (14), declares that "'Contract of insurance' shall mean and include any policy, certificate, interim receipt, or renewal receipt, or writing evidencing the contract, or any contract or agreement sealed, written or oral, the subject-matter of which is insurance." A policy is evidence of a contract, but is not itself the contract. The contract may be by parol, in which case there is no policy to submit to the applicant for acceptance or refusal. The application

is an offer, and may be accepted, as was, I think, correctly observed by my brother Ferguson, during the argument, by any sufficient corporate act, not necessarily the granting of a policy.

Further, by sec. 155 of the Act, the contract of insurance, if posted or committed to any one for delivery to the assured, is deemed evidence of the contract.

The plaintiff has, in my opinion, failed to shew that an insurance contract on the life of her husband was in force at the time of his death, and the judgment in her favour should be set aside and this action dismissed with costs here and below.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J. Ex.

RIDDELL, J.:—The defendants are a life insurance company, whose agent obtained from J. E. Robinson, the (now deceased) husband of the plaintiff, an application for a policy on his life for \$1,000, payable to her. The chronology is important, and I here set it out:—

On the 3rd February, 1917, Saturday, the deceased went to Preston, and there signed an application for a policy on his life for \$1,000, 20 yearly payments, without profits. Being informed that the quarterly premium was \$8.62, he paid the company's agent \$5, receiving therefor a receipt for "\$5.00, which is a payment on account of first year's premium on insurance of \$1,000.00 for which application has this day been made in the above named company. No obligation is incurred by said company by reason of the payment unless said application is accepted and a policy granted" (exhibit 1). He also gave a note for \$3.62 for the balance (exhibit 4).

Robinson also on the same day submitted to a medical examination at Preston (exhibit 9), but this was not sent on.

On the 4th February, the agent at Preston mailed the application, the \$5, and the promissory note, but not the medical examination, to the head office at London, Ontario, and it was there received on the 5th February, Monday.

On the 6th February, on the application being examined by the clerks in the head office, and the occupation of Robinson (as foreman on a blast furnace) appearing hazardous, the application and note were returned to the Preston agent, and his attention called

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to the facts. He was asked, "Kindly have the necessary changes made and initialled by the applicant."

On the 8th February, the Preston agent wrote the applicant, telling him the facts and asking him to initial the alterations the agent had made in the application and note (which papers the agent enclosed to him).

On the 10th February, the medical examination reached the head office.

Two weeks later, i.e., on the 24th February, the applicant sent his wife, the present plaintiff, to the office of the Preston agent, with the application and note properly initialled. She, however, paid the amount of the note, \$4.37, in cash, and was given a receipt: "Received from Mrs. Robinson the sum of \$4.37, being balance of quarterly premium for application for \$1,000 insurance from London Life Ins. Co." She was assured by the agent that a policy would issue, and (apparently) that the receipt was as good as a policy. On the same day the agent sent the amended application with the \$4.37 to the head office, returning the note to Robinson.

On the 25th February, Robinson died, apparently from the fumes of a coal-stove.

On the 26th February, the amended application and \$4.37 were received at the head office and examined by the clerks.

On the 27th February, the medical report was taken to the medical referee and approved. The policy was actually written and put on the list for mailing the following day, but it was not signed or sealed.

On the same day, the widow notified the Preston agent of the death, and the agent wrote the head office.

On the 28th February, the information reached the head office.

No further steps were taken toward completing the policy, and the paper which would have become a policy, if completed, was destroyed. The agent was notified that the policy had not issued, and a cheque for \$9.37 was sent to the widow. She did not cash the cheque, but kept it; at length, on the 16th April, she consulted her solicitor, who made a claim on the company (enclosing the cheque). The company repudiated liability, and re-enclosed the cheque, which was produced by the plaintiff at the trial, never having been cashed or endorsed.

An action was brought, which was tried by the Chief Justice

of the King's Bench, without a jury, at Hamilton, resulting in a judgment for the plaintiff for the amount of her claim with costs.

The defendants now appeal.

The recent cases do not seem to have been brought to the attention of the learned Chief Justice. They seem to me conclusive against the plaintiff's claim.

In *Sharkey v. Yorkshire Insurance Co.*, 37 O.L.R. 344, 28 D.L.R. 191 (affirmed in the Supreme Court, 54 S.C.R. 92, 32 D.L.R. 711), it was pointed out that the ordinary application for insurance is not a tender which will become a contract, but a request to the company to offer a policy; that, if the company tender a policy on such request, the proposed assured may decline to accept it. "If the assured accept the policy tendered, then and only then the contract is complete" (37 O.L.R. at p. 352). See the cases cited.

Of course, the application or other document may stipulate for any other method of acceptance. For example, in *North American Life Assurance Co. v. Elson* (1903), 33 S.C.R. 383, there was a stipulation "that the issue and delivery of a policy in the usual form should be the only acceptance thereof" (see Printed Cases in the Supreme Court of Canada in the general Library, Osgoode Hall, vol. 238 (1903), at p. 49 of the case), and it was held for this reason that the policy became effective when it was mailed to the assured: 33 S.C.R. at p. 392.

There is no such provision here, nor is there, as in that case, an application for a policy in "the company's usual form."

The fact that the applicant in his application answers in the affirmative the question, "If a policy is written by the company do you agree to accept and pay for the same on presentation?" does not matter. It was decided, and properly decided, in the Queen's Bench Division, about 20 years ago, that such a promise cannot be ordered to be specifically performed, the only recourse for the company being to sue in damages.

No policy having been accepted by the assured, or any one representing him, I think the defendants are not liable.

But this is a much stronger case for the defendants than the *Sharkey* case. Here there was no actual issue of a policy at all.

A policy must, to bind a company, be made either by a corporate act or by some agent duly authorised thereto. Of course, I am not here speaking of special cases of estoppel and the like.

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Here there is no pretence that there was any corporate act, and the only persons authorised to "accept any applications for insurance" are "the manager, assistant-manager, or acting manager for the company;" and it is not contended that any of these had any knowledge of or acted on the application.

A still further ground of defence is, that not even any of these could act unless the application "be first approved by the company's medical referee" (exhibit 13). The medical referee never saw the application until after the applicant was dead.

I would allow the appeal with costs here and below, if demanded.

FERGUSON, J.A.:—Being of opinion that it is not necessary to the decision of the case at Bar to consider the effect of the opinions in *Sharkey v. Yorkshire Insurance Co.*, I agree in the result.

Appeal allowed.

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[APPELLATE DIVISION.]

Mar. 25.

UNGER v. HETTLER LUMBER CO.

Public Health Act—Person Employed in Lumber-camp—Liability of Employer for Expenses of Illness Contracted in Camp—R.S.O. 1914, ch. 218, sec. 118—Regulations Made by Provincial Board of Health—Contract with Physician—Oral Agreement—Sufficiency—Right of Father of Employee to Maintain Action—Costs—Scandalous Allegation in Statement of Defence.

The plaintiff, the father of a boy who was employed by the defendants in a lumber-camp in one of the unorganised districts of Ontario, sued for the expenses incurred by him in providing medical care and attendance for his son, who contracted typhoid fever in the camp, alleging the default of the defendants in the failure to employ a duly qualified medical practitioner in the camp: sec. 118 of the Public Health Act, R.S.O. 1914, ch. 218:—

Held, upon consideration of the provisions of sec. 118 and the regulations made thereunder by the Provincial Board of Health, that the defendants had not failed to employ a duly qualified medical practitioner, although their contract with the medical man employed by them at the time when the plaintiff's son became infected, was merely an oral one—a written contract was required by one of the regulations, but for a purpose which had no bearing upon the defendants' discharge of their duty to their employees.

The question whether, in any event, the plaintiff was a person who could maintain the action, was not considered.

The defendants, though successful, were deprived of costs because they had in their statement of defence made a baseless charge of theft against the plaintiff's son, which they had not withdrawn, and which was now ordered to be expunged as scandalous.

Judgment of the District Court of the District of Nipissing reversed.

AN appeal by the defendants from the judgment of the Judge of the District Court of the District of Nipissing, in favour of the plaintiff, for \$144 and costs, in an action for the recovery of money expended by the plaintiff in connection with the illness (typhoid fever) of his son, said to have been contracted by the son while in the service of the defendants in a lumber-camp.

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March 8. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ., and FERGUSON, J.A.

R. C. H. Cassels, for the appellants, referred to the Public Health Act, sec. 118, and the regulations made thereunder by the Provincial Board of Health, upon breach of which the plaintiff's action was based, and argued that, at the time of his son's illness, there was a contract between the defendants and Dr. McKee, although the contract was not in writing. There was a written contract for the previous season, which had been continued by oral agreement and was in force.

R. T. Harding, for the respondent, the plaintiff, argued that, under regulation 5, a written contract was absolutely necessary in order to absolve the defendants from liability. The defence now relied upon is an afterthought, as it was alleged in the first instance that the young man was not ill at all, and that he had been dismissed for theft, a charge which there was no evidence to support.

Cassels, in reply, argued that, as between the parties to the action, an oral contract was sufficient to relieve the defendants from liability.

March 25. MULOCK, C.J. Ex.:—This is an appeal by the defendant company from the judgment of His Honour the Judge of the District Court of the District of Nipissing, in favour of the plaintiff, for \$144 expenses incurred by him in providing medical care and attendance for his son when suffering from typhoid fever contracted whilst in the defendant company's service.

The defendant company are employers of labour in their lumber-camp, in the unorganised district of Nipissing. About the 2nd September, 1915, Ernest Unger, a young man under the age of 21 years, and son of the plaintiff, entered their service at their camp and continued in their employment until the 15th

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October, 1915, on which day he left on account of illness, returning to his father's home. The plaintiff at once summoned a medical man, and, on his advice, placed his son in hospital under the care of Dr. Brandon, who on the 21st October found him suffering from typhoid fever, and the judgment in question is in respect of the expenses which the plaintiff incurred in thus providing his son with hospital and medical services.

The plaintiff contends that, by virtue of the Public Health Act, R.S.O. 1914, ch. 218, and the regulations made thereunder by the Provincial Board of Health, he is entitled to recover those expenses from the defendant company.

Section 118 (1) (d) enacts that the Board of Health may make regulations "for providing for the employment of duly qualified medical practitioners by employers of labour in lumbering camps," etc.; and sub-sec. (4) declares that: "If default is made in complying with any of the regulations the Board may direct that what is omitted to be done shall be done at the expense of the person, firm or corporation in default, and if the default is the failure to employ a duly qualified medical practitioner, as provided by clause (d) of sub-section 1, the employing person, firm or corporation shall be liable to pay the reasonable expenses incurred by any employee for medical attendance and medicines, and for his maintenance during his illness."

Regulations No. 3 and 4 of the Board, made under the authority of sec. 118, are as follows:—

Regulation (3): "Every employer of labour on any work other than a lumber-camp shall contract with one or more duly qualified physicians for the medical and surgical care of his employees; and may deduct from the pay due any employee a sum not exceeding \$1 per month, which shall be paid to the physician or physicians so contracted with, without rebate or deduction, and every such physician shall supply medical attendance and medicine to the employees."

Regulation (4): "Every employer of labour in a lumber-camp may contract with one or more duly qualified physicians in the manner hereinbefore provided, and in that case may proceed in the manner authorised by the said regulations, and every physician so contracted with shall possess the powers and perform the duties set out in the next preceding regulation, but every such employer

who does not contract for the medical attendance of his employees shall be responsible for the medical care and maintenance of each and every employee taken ill while in his employ, and shall incur a like responsibility for each and every case of sickness which developes in an employee after quitting his service or after being discharged from his employ when, in the opinion of the Provincial Board, the origin of such sickness is traceable to the period of such employment," etc.

Regulation No. 5 requires employers of labour on all works in unorganised districts to "transmit, at the time of the making of the contract, a copy of the same to the Secretary of the Provincial Board of Health, and notice of any subsequent change made in their physicians, or of changes in the contracts between the two contracting parties."

On the 28th August, 1914, the defendant company entered into a written contract with Dr. McKee, a duly qualified physician, whereby the latter agreed to furnish surgical and medical attendance to the men employed by the company at their camp, during the season 1914-1915, and to provide hospital accommodation for hospital cases at Cache Bay, North Bay, or Sudbury. The company's operations ended in or about the month of May, 1915, and the contract then also terminated.

Prior to Ernest Unger entering the service of the defendant company, the latter made a verbal contract with Dr. McKee for the coming season, being of the same tenor as the expired written one; and, in pursuance of such verbal contract, Dr. McKee entered upon his duties as contracting physician, visiting the camp on many occasions, beginning on the 24th August, 1915, and continuing until after Ernest Unger had left the company's service.

The plaintiff's counsel contended that a verbal contract did not fulfill the requirements of the regulations.

By regulation (4), the employer "may contract . . . in the manner hereinbefore provided." This has reference to regulation No. (3), but that regulation does not require a written contract, nor is there anything in regulation No. 4 calling for a written contract. Regulation 5 contemplates a written contract merely for the purpose of the Board of Health; but, *quoad* employees, a contract, whether verbal or written, meets the requirements of regulation No. 4.

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I am therefore of the opinion that the company had contracted within the meaning of regulation No. 4, and therefore they are not responsible either to Ernest Unger or to his father for Ernest's medical care and maintenance during his illness.

This conclusion having been reached, it is not necessary to determine whether in any event the father could maintain this action.

As to the question of costs, the defendant company in their statement of defence allege that Ernest Unger was dismissed for theft, and that he left their employ in apparent good health and without complaining of being unwell. The evidence shews that he was ill before leaving; and there is, in my mind, no doubt that the typhoid fever which subsequently developed had its origin whilst he was in the service of the defendant company. The statement that Ernest Unger was dismissed for theft was irrelevant to the issue, and no evidence whatever was offered in support of it, and the conclusion is that the charge was baseless. In fairness to the man charged, the defendant company should at the trial have publicly withdrawn it and asked that it be expunged from their statement of defence. They not having done so, I think we should on this appeal order that the charge be expunged from the statement of defence as scandalous, and because of its baseless nature the defendant company should be deprived of any costs here or below.

Being of the opinion that the plaintiff has no cause of action, the appeal should be allowed and the action dismissed, without costs.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J. Ex.

RIDDELL, J.:—This is an action brought under the provisions of R.S.O. 1914, ch. 218.

Ernest Unger, being the infant son of the plaintiff, engaged with the defendants at their lumber-camp, about 17 miles from Field. It is admitted (though I should have had great difficulty in so finding on the evidence) that he contracted typhoid fever at the defendants' camp. He, feeling sick, left the defendants' employ on the 8th or 9th October, 1915, and some eight or nine days thereafter arrived at the plaintiff's home, plainly suffering

from typhoid. He was taken to the hospital at North Bay, where he recovered, and is now on active service abroad. The plaintiff, his father, sued the defendants for the amount of the hospital bill, and recovered judgment for \$144 in the District Court of the District of Nipissing. The defendants now appeal.

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The whole cause of action is based on sec. 118 (4) of the statute, R.S.O. 1914, ch. 218. By sec. 118 the Provincial Board of Health is authorised to make regulations, (1) (d): "For providing for the employment of duly qualified medical practitioners by employers of labour in lumbering camps . . . and for the erection of permanent or temporary hospitals for the accommodation of persons . . . employed." Sub-section (4) provides: "If default is made in complying with any of the regulations . . . and if the default is the failure to employ a duly qualified medical practitioner, as provided for by clause (d) of sub-section (1), the employing person, firm or corporation shall be liable to pay the reasonable expenses incurred by any employee for medical expenses and medicines, and for his maintenance during his illness."

The Provincial Board of Health made regulations, amongst other things, as follows:—

"1. Every employer of labour on any work in any lumbering, mining, construction or other camp, saw-mill and other industry situate in any portion of the unorganised districts without municipal organisation, shall, upon the establishment of each and every camp and work, forthwith notify the Provincial Board of Health of the establishment of the same . . .

"2. Every employer of labour on any such work shall contract with a duly qualified physician for the sanitary supervision of camps, dwellings, or works, and such physician shall inspect the same at least once a month or oftener if, in the opinion of the Chief Officer of Health, the health conditions of the Province require it, and shall forthwith report in writing to the Provincial Board . . ."

"4. Every employer of labour in a lumber-camp may contract with one or more duly qualified physicians in the manner hereinbefore provided, and in that case may proceed in the manner authorised by the said regulations, and every physician so contracted with shall possess the powers and perform the duties set out in the next preceding regulation, but every such employer

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who does not contract for the medical attendance of his employees shall be responsible for the medical care and maintenance of each and every employee taken ill while in his employ . . .

"5. Employers of labour on all works in the unorganised districts without municipal organisation, shall transmit, at the time of the making of the contract, a copy of the same to the Secretary of the Provincial Board of Health, and notice of any subsequent change made in their physicians, or of changes in the contracts between the two contracting parties . . ."

The defendants did employ Dr. McKee, a duly qualified physician, and entered into a written contract with him, on the 29th August, 1914, for one year; a copy of this contract was sent to the Provincial Board. When the year expired, the defendant and the doctor not being certain what the Compensation Board (that year instituted) would do in respect of camp-work, agreed that the employment of the doctor should continue under the agreement of August, 1914, until they found out what the Compensation Board would do. The doctor went on as usual; and there is no pretence that he did not visit the camp at proper intervals or that he in any wise failed to perform his duties.

On the 30th October, 1915, a new contract was signed, and a copy sent to the Board. It was during the time before this day, and while the doctor was working under the verbal extension of the former contract, that the infection took place.

The whole ground of action is this: the regulations have the force of law; they provide for a copy of the doctor's contract being sent to the Board, therefore a written contract alone will answer the requirements; accordingly, unless the doctor is working under a written contract, there is a "failure to employ a duly qualified medical practitioner, as provided by clause (d) of sub-section (1)," and the defendants are liable.

I think the argument cannot succeed. Clause (d) gives the Board power to make regulations "for providing for the employment of duly qualified medical practitioners;" and the Board (in the second extract above) made a regulation that the employer should contract with a duly qualified physician for sanitary inspection of the camp, and (in the third) gave power to the employer to contract for the medical care of the employee.

In certain localities the Board requires a copy of the contract

to be sent in; but that has nothing to do with the employment; it merely offers a convenient, speedy, and certain method of proving that the employment has taken place. The requirements authorised by clause (d) are exhausted by the previous regulations, and that of a copy of the contract is not within the purview of the clause.

Had the defendants failed to carry out the regulations requiring or authorising the employment of a physician, sub-sec. (4) would or might apply, but not if they simply had an oral and not a written contract.

I think the action cannot succeed; the appeal should be allowed and the action dismissed; but, for the reasons mentioned by the Chief Justice, without costs.

If sub-sec. 4 were held to apply, there might be other difficulties in the plaintiff's way—e.g., his right to sue etc.; but, in the view I take of the case, it is not necessary to consider these.

FERGUSON, J.A., agreed with RIDDELL, J.

Appeal allowed.

[APPELLATE DIVISION.]

RE CITY OF TORONTO AND TORONTO AND YORK RADIAL R.W. CO.
AND COUNTY OF YORK.

Street Railway—Expropriation of Portion by City Corporation—Special Act, 7 Geo. V. ch. 92, sec. 4 (1) (O.)—Claim of County Corporation for Damages under sub-sec. (7)—Disallowance by Ontario Railway and Municipal Board—Right of Appeal—Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 48 (1)—Leave to Appeal—Jurisdiction of Appellate Division of Supreme Court of Ontario—Rights of County Corporation—Transfer of Highway to Minor Municipalities—Agreement between County Corporation and Railway Company—60 Vict. ch. 93, sec. 15 (O.)—Statutes and By-laws.

By an Act of the Ontario Legislature, passed in 1917, 7 Geo. V. ch. 92, the city corporation was (sec. 4 (1)) authorised to acquire the portion of the railway upon Y. street, within the city limits, paying compensation, to be determined by the Ontario Railway and Municipal Board, "subject to either party"—i.e., the city corporation or the railway company—"having the right to one appeal to the Appellate Division of the Supreme Court of Ontario." By sec. 4 (7), if the county corporation made any claim against the city corporation by reason of the exercise of the powers conferred by sec. 4, the claim was to be adjudicated upon by the Board; but no right of appeal was given by the statute to the county corporation. A claim was made by the county corporation and disallowed by the Board, on questions of law; and the county corporation applied to a Divisional Court of the Appellate Division, under sec. 48 (1) of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 48 (1), for leave to appeal:—

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Held, that the provisions of sec. 48 (1) applied to the jurisdiction given to the Board by other statutes (such as the Act of 1917): see secs. 21 (1), 22, 23 (2), 49 of ch. 186; although a right of appeal was expressly conferred upon the other parties by sec. 4 (1) of the Act of 1917, the maxim *expressio unius est exclusio alterius* did not apply; and the Court had jurisdiction to give the county corporation leave to appeal.

The Board declined to hear evidence offered by the county corporation, upon the ground that it had abandoned the York roads and transferred them to minor municipalities of the county, and had thereby ceased to have any claim for damages under the Act of 1917; and upon the ground that the county corporation had no such interest under the agreement of the 6th April, 1894, as to give it any right "in gross" to damages:—

Held, that the agreement of 1894 was not simply validated by the statute of 1897, 60 Vict. ch. 93; by sec. 15, the privileges and franchises created by the agreement were made existent and valid to the same extent and in the same manner as if set out and enacted as part of the Act; the rights of the county corporation did not depend upon ownership of the highway; and they were not divested by any statute or by-law.

Leave to appeal was granted, the appeal was allowed, and it was ordered that the county corporation should be permitted by the Board to give evidence in support of the claim made.

APPLICATION on behalf of the Corporation of the County of York for an order granting the corporation leave to appeal from an order of the Ontario Railway and Municipal Board dated the 1st February, 1918, on the following among other grounds:—

(1) That the order was wrong in law and should not have been made.

(2) That the applicant corporation had a claim against the city corporation, for which it should receive compensation upon hearing and award pursuant to an Act respecting the City of Toronto, passed by the Legislature of Ontario in 1917, 7 Geo. V. ch. 92, sec. 4.

(3) That the county corporation was entitled to be heard and to give evidence in support of the particulars of its claim against the city corporation by reason of the exercise of the powers conferred upon the city corporation by the said statute.

(4) That the county corporation had an interest in the highways in question, for which it should receive compensation under the said statute.

(5) That, under the several agreements between the county corporation and the Metropolitan Street Railway Company, the county corporation had the several rights against the Toronto and York Radial Railway Company shewn in the particulars of claim, and that the said rights were prejudiced and would be seriously impaired by the exercise by the city corporation of the said powers to the damage of the county corporation, for which it was entitled to compensation under the said statute.

The county corporation also appealed from the said order, upon the grounds aforesaid.

The particulars of claim were as follows:—

The Corporation of the County of York says that under various franchise agreements made between it and the Metropolitan Street Railway Company, now the Toronto and York Radial Railway Company, evidenced by certain indentures or writings dated respectively the 25th June, 1884, the 20th January, 1886, the 28th June, 1889, the 17th December, 1889, the 20th October, 1890, the 2nd March, 1891, and the 6th April, 1894, certain privileges and franchise rights enured to its benefit in respect to “that portion of the railway of the Toronto and York Radial Railway Company (Metropolitan Division) upon Yonge street within the limits of the City of Toronto and all the real and personal property used in connection therewith, and necessary for the operation thereof, including all franchises, rights and privileges, which it” (the Toronto and York Radial Railway Company) “now has or may enjoy respecting the construction, maintenance, and operation of a railway within the city limits on the said street.”

Some of the said privileges and franchise rights of the Corporation of the County of York are the following:—

(1) The contingent right to authorise the railway company to lay down a double track or railway on Yonge street, under para. 2 of the agreement of the 28th June, 1889, and under paras. 13 and 32 of the agreement of 1894.

(2) The regulation of the speed of travel and the stops for loading and unloading of milk-cans, under para. 21 of the agreement of 1894.

(3) The fixation of the maximum rate for fares under para. 25 of the agreement of 1894.

(4) The conveyance of freight, goods or merchandise, by the railway company on rates that may be agreed upon, and, in case of a difference as to the rates, as may be fixed and settled by the Lieutenant-Governor in Council under para. 26 of the agreement of 1894.

(5) The renewal of the privileges and franchise rights to be granted to the Toronto and York Radial Company on the 3rd February, 1929, for a period of 35 years thereafter, upon new terms and conditions, under para. 32 of the agreement of 1894.

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(6) The renewal of the privileges and franchise rights to be granted to the Toronto and York Radial Railway Company on the 3rd February, 1964, and on each successive future term of 35 years, on further new terms and conditions, under para. 32 of the agreement of 1894.

(7) The contingent right to the Corporation of the County of York to take over the real and personal property of the railway company at a valuation to be determined by arbitration under para. 33 of the agreement of 1894.

The Corporation of the County of York says that, by reason of the exercise by the Corporation of the City of Toronto of the powers conferred upon them by sec. 5 of the Act 7 Geo. V. ch. 92, the said enumerated privileges and franchise rights enuring to the benefit of the said Corporation of the County of York will be, in whole or part, taken away, terminated, or otherwise interfered with, and an injury will be caused to the Corporation of the County of York thereby.

The Corporation of the County of York hereby makes claim on the Corporation of the City of Toronto, by reason of the foregoing, for the injury which will be sustained by the said county corporation; and, in the event of disagreement between the Corporation of the County of York and the Corporation of the City of Toronto as to the money payment therefor, or generally in regard thereto, the Corporation of the County of York asks that its claim be adjudicated upon and determined in accordance with the provisions of sub-sec. 7 of sec. 5 of the Act 7 Geo. V. ch. 92.

By the order of the Board, the claim of the County Corporation was disallowed and dismissed.

The reasons of the Board were given in writing. The concluding portions were as follows:—

In argument Mr. McGregor Young based the right of the county to intervene in this reference upon two grounds:—

1. That, notwithstanding the provisions of by-law No. 712, some residuum of interest in this highway (Yonge street) still resides in the county corporation.

2. That, if it should now be held that the county is excluded from all interest in the part of Yonge street in question, the county will be prejudiced at the expiration of the franchise period in 1929 in its negotiations with the company for a renewal of the

franchise, or for the expropriation of the railway, by reason of the fact that the fruitful, profitable part of the railway—that within the city of Toronto—is severed from the main portion to the north, situate in the county.

The Board is of the opinion that neither of these grounds of claim is tenable.

(1) Dealing first with the first contention set out above. As to that part of Yonge street situate within the district which was annexed by the Board's order of 1908, it is clear that the operation of by-law No. 712 of the County of York had effectually put all title out of the county. The words of disposition used in paras. 3 and 4 of the by-law are that Yonge street "shall hereafter become the property of and be owned as a public highway by," etc. No more comprehensive words of devolution could be used; "property" being the highest right a man can have to a thing; and "owner" being the person in whom for the time being property is beneficially vested. Emphasis was sought to be laid in argument on the phrase "as a public highway," as indicating an intention to reserve to the county some interest in the subject-matter of the disposition; but surely that was the only quality in which the property could be disposed of by the county council, and the words used were competent to dispose of the county's entire interest.

Even though the by-law were ineffectual to vest the highway in the local municipalities concerned, it was effectual as an abandonment of the highway by the county corporation, under clause 7 of sec. 566 of the Municipal Act, 1892; and thereupon, by virtue of sec. 527 of the same Act, the highway became vested in the several local municipalities in which the highway was situated. Upon the issue of the Board's order of 1908, that part of Yonge street embraced in the district annexed by that order passed to the City of Toronto, both as to jurisdiction and ownership.

As to that part of Yonge street which was assumed by the County of York in 1911, under its by-law No. 1053, the only sound conclusion seems to be that thereafter, upon the issuing of the Board's orders dated 1912 and 1914, the portions of Yonge street embraced within the districts thereby annexed passed to the City of Toronto, both as to jurisdiction and ownership. This was the view adopted by the Lords of the Privy Council in

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Toronto Suburban R.W. Co. v. Toronto Corporation, [1915] A.C. 590. In speaking of a similar franchise agreement in question there, Lord Haldane says, at p. 594: "This agreement was made between the Corporation of the Township of York, within the limits of which was at that time the land on which part of the railway was situate, and the railway company. In 1909 this land was included within the municipal limits of the respondents" (the City of Toronto), "who succeeded to the rights and obligations of the other corporation."

The claim made here by the County of York bears no likeness to that successfully pressed in the recent case *County of Wentworth v. Hamilton Radial Electric R.W. Co. and City of Hamilton* (1914-16), 31 O.L.R. 659, 35 O.L.R. 434, 28 D.L.R. 110, 54 S.C.R. 178, 33 D.L.R. 439. It is to be noted that in that case, though the trial Judge held that the Board's order did not vest the highway in question there in the City of Hamilton, the decision of the Supreme Court of Canada proceeded rather upon the view that the County of Wentworth was entitled to recover upon a right in contract—a covenant to pay a sum certain—quite irrespective of the question whether or not the highway had vested in the city. Here there is no suggestion of a claim in gross, as in the *Wentworth* case, but rather the assertion by the county of claims which directly challenge the jurisdiction and ownership of the City of Toronto in respect of the highway in question. These claims are, in the opinion of the Board, without vestige of right, either jurisdictional or proprietary. It will be noted that, under sec. 433 of the present Municipal Act, in the absence of other express provision, the ownership of a highway is vested in the municipality having jurisdiction over it.

(2) The contention that, by reason of the severance of the highway, the county will be prejudiced in its negotiations with the company upon the expiry of the latter's franchise in 1929, is singularly wanting in merit, coming from a corporation which, upwards of 20 years ago, voluntarily abandoned the entire highway then in the county as an unwelcome incumbrance. True, many years after, with a juster sense of its duty, it assumed it as a part of its system of county highways. Still, for the reasons above given, the Board is of the opinion that the orders of the Board have been effective in divesting the county of all jurisdiction and

ownership in respect of the part now within the City of Toronto, and that there is outstanding in the County of York no interest which entitles it to intervene upon this reference.

February 14 and 25. The application was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

Irving S. Fairty, for the city corporation, respondent, took the preliminary objection that no appeal lay to the Court from the order of the Board. He said that the only right of appeal under the Ontario Act of 1917, respecting the City of Toronto, 7 Geo. V. ch. 92, was given by sec. 4, which makes the power to expropriate on the part of the city corporation "subject to either party having the right to one appeal to the Appellate Division." "Either party" could refer only to the Corporation of the City of Toronto and the Toronto and York Radial Railway Company. No appeal was given under sub-sec. 7 of sec. 4 to the Corporation of the County of York. The Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 48, had no application to the present case.

McGregor Young, K.C., for the County Corporation, the applicant, submitted that there was a right of appeal. He said that the jurisdiction of the Board under the Railway and Municipal Board Act, secs. 21 to 27 inclusive, covered the present case.

[THE COURT decided to hear the application as upon an appeal on the merits, subject to the objection.]

Young, K.C., stated that the Board had disallowed the claim of the county corporation on the grounds: (1) that the county corporation had parted with its ownership of the part of Yonge street in question; and (2) that there was no agreement "in gross." In regard to the first ground, counsel denied that the county corporation had parted with all its interest in the street. There remained in the county corporation a residue of ownership or title. The county corporation still had the fee, subject to the highway easement; and, more than that, had a future right to arbitrate. The agreement of the 6th April, 1894, which appears in schedule A. to the Ontario statute of 1897, 60 Vict. ch. 93, and under which the county corporation claims, is validated by that statute. Under it, the county corporation has the rights which it claims, and these rights have never been divested. The transfer of

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the highway does not divest those rights: *County of Wentworth v. Hamilton Radial Electric R.W. Co. and City of Hamilton*, 54 S.C.R. 178, 33 D.L.R. 439. The rights of the county corporation are "in gross," in the sense in which the term is used by the Board: *Toronto Suburban R.W. Co. v. Toronto Corporation*, [1915] A.C. 590, 24 D.L.R. 269. As there was nothing to divest the county corporation of its rights, it should have been given a chance to adduce evidence to substantiate its claims.

Fairty argued that the decision of the Board should stand. The county corporation had abandoned all the right, title, and interest which it had had in the portion of the highway in question, by by-law No. 712, and had no such interest under its agreement as to give it a right "in gross" for any right to damages: *Vancouver Power Co. Limited v. North Vancouver District Corporation*, [1917] A.C. 598, 36 D.L.R. 462; *Pearce v. City of Toronto* (1913), 25 O.W.R. 321.

Young, K.C., in reply.

March 25. CLUTE, J.:—Application by the County of York for leave to appeal from an order of the Ontario Railway and Municipal Board, dated the 1st February, 1918, disallowing and dismissing the county's claim.

The question arose under the Ontario Act, 1917, 7 Geo. V. ch. 92, sec. 4, which gives power to the city to expropriate part of the Toronto and York Radial Railway.

Sub-section (7) of sec. 4 provides that, in the event of the County of York making any claim against the city by reason of the exercise of the powers conferred by sec. 4, the corporation of the county, within one month after the passing of the Act, shall furnish particulars of its claim to the city, and such claim, in the event of disagreement, shall be adjudicated upon and determined by the Ontario Railway and Municipal Board. If such claim is not made within a month, or if it is disallowed by the Board, or upon payment by the city to the county of the amount of such award, after taking over the railway as therein provided, the rights, if any, of the said Corporation of the County of York shall cease and be determined.

Mr. Fairty, for the city, made the preliminary objection that no appeal would lie to this Court from a decision of the Board.

It was arranged to argue the preliminary objection and the merits of the appeal together. I am of opinion that the objection to the right of the county to appeal to this Court from a decision of the Board is not well taken. The only right of appeal given by the Act is under sec. 4 (1), which makes the power to expropriate on the part of the city "subject to either party having the right to one appeal to the Appellate Division of the Supreme Court of Ontario." "Either party" evidently refers to the City of Toronto and the Toronto and York Radial Railway Company, and no appeal is given under sub-sec. (7) to the County of York.

The Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 48, provides that an appeal shall lie from the Board to a Divisional Court upon a question of jurisdiction or upon any question of law, but such an appeal shall not lie unless leave to appeal shall be obtained from the Court within one month after the making of the order.

It was objected that this right of appeal has no application to the present case, inasmuch as it arises under an Act of the Legislature. The answer to this, I think, is, that the jurisdiction of the Board under the Railway and Municipal Board Act covers a case like the present. Sections 21 to 27 inclusive deal with the question of jurisdiction and powers of the Board.

Section 21 gives general jurisdiction in respect of railways and public utilities; sub-sec. (3) provides that the Board, as to all matters within its jurisdiction, shall have authority to hear and determine all questions of law or of fact; and sec. 22 declares that the Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act *or by any other general or special Act*. Then sec. 48 declares that an appeal shall lie to the Divisional Court, upon a question of jurisdiction or any question of law, upon leave of the Court.

In my opinion, the county having given the requisite notice and applied within the time, this Court has jurisdiction to grant such leave.

The Board declined to hear evidence offered by the county, upon the ground that the county was not entitled to present any claim by reason of the effect of certain Acts and by-laws. That was a question of law, as well as a question of fact.

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The judgment of the Board proceeded mainly upon the ground that the county, under by-law 712, had abandoned the York roads and transferred the same to minor municipalities of the County of York; and, having so disposed of their interest and control of Yonge street, the county ceased to have any claim in respect of damages under the Act of 1917; and that the county had no such interest under its agreement of the 6th April, 1894, as to give it any right "in gross" arising out of the said agreement for any claim to damages under the said Act.

The agreement with the Toronto and York Radial Railway Company arises out of its original agreement, found in schedule A. to the Ontario Act respecting the Metropolitan Street Railway Company, 1897, 60 Vict. ch. 93, by which the said agreement is made a part of the Act "in the same manner as if the several clauses of such agreements were set out and enacted as part of this Act:" sec. 15.

The county's claim for damages is set forth in the particulars and in the notice of motion.

In my opinion, by-law 112, giving to the minor municipalities the duty and right of making repairs to Yonge street, does not in any way affect the county's claim to damages, if otherwise entitled. This does not affect the county in respect of its agreement with the Radial. It is not necessary, nor do I think it proper, to express an opinion as to which of the clauses of its agreements with the Radial the county has the right to make claim under, or whether all. That is a question of law and fact, and ought not, I think, to be prejudged before the evidence which the county may offer is submitted.

The appeal should be allowed upon its merits, the order of the Board set aside, and the county permitted to offer such evidence as it may be advised in support of its claim. The city should pay the costs of this appeal upon taxation.

MULOCK, C.J. Ex., and SUTHERLAND, J., agreed with CLUTE, J.

RIDDELL, J.:—By the Act of 1917, 7 Geo. V. ch. 92, sec. 4 (O.), the City of Toronto was authorised to acquire that portion of the Toronto and York Radial Railway upon Yonge street, within the limits of the city, paying compensation, to be determined (in

case of disagreement) by the Ontario Railway and Municipal Board, "subject to either party having the right to one appeal to the Appellate Division of the Supreme Court of Ontario."

Section 4(7) provides that, in the event of the Corporation of the County of York making any claim against the City of Toronto by reason of the exercise of the powers conferred by sec. 4, the claim "shall be adjudicated upon and determined by the Ontario Railway and Municipal Board If such claim is not made within . . . one month or if it is disallowed by the said Board, or upon payment by the . . . City of Toronto to the . . . County of York of the amount of such award after taking over the railway . . . the rights, if any, of the . . . County of York shall cease and determine." No right of appeal is given to the County of York by the statute.

The County of York made a claim as provided for by sec. 4(7): the Board disallowed the claim in the following terms:—

"1. This Board doth order and adjudge that the claim herein of the said respondent the Corporation of the County of York be and the same is hereby disallowed and dismissed."

A perusal of the reasons for judgment makes it plain (as is not indeed disputed) that the disallowance of the claim of the county was on questions of law, and not of fact—the facts, so far as they enter into the judgment, are all admitted, and the disallowance of the claim is substantially what in the former common law practice would be called allowing a demurrer.

The county applied to this Court for leave to appeal under R.S.O. 1914, ch. 186, sec. 48(1). We reserved judgment upon this motion till we heard the merits—these have now been argued, and we proceed to dispose of the case.

The first point to be decided is as to the right to appeal at all.

Admittedly the right to appeal must be given expressly and by unmistakable legislation: *Attorney-General v. Sillem* (1864), 10 H.L.C. 704.

It is argued that sec. 48(1) of the Ontario Railway and Municipal Board Act does not apply to the present case, for two reasons: (1) because the powers of the Board *pro hac vice* are given by the Act of 1917, and not by the Ontario Railway and Municipal Board Act, and are of a special nature not contemplated by this Act; (2) in any event sec. 4(1) gives an express power of appeal, whereas there is none in sec. 4(7)—"*expressio unius est exclusio alterius*."

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But the general Act plainly contemplates other matters being added to the jurisdiction of the Board; in addition to the jurisdiction expressly mentioned in sec. 21(1), sec. 22 provides that "the Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act;" *cf.* secs. 23(2), 49. I see no reason why the provisions of sec. 48 do not apply to such jurisdiction given by other Acts, general and special, as well as to the jurisdiction given by sec. 21 (1) of the Ontario Railway and Municipal Board Act.

In the Assessment Act, R.S.O. 1914, ch. 195, sec. 80 (6), there is a special provision as to appeal, i.e., "upon questions of law" only, which is not the same as in the Ontario Railway and Municipal Board Act, sec. 48, "upon a question of jurisdiction or upon any question of law," and the time is not limited as in the latter Act. No doubt, the provisions of the Assessment Act would be looked at in an appeal under that Act; but, as we shall see, there is nothing of the kind in the Act of 1917.

Of the many sections of the Municipal Act conferring jurisdiction on the Board, there seems to be only one which requires particular notice, viz., sec. 469. In that section the order of the Board there contemplated is declared to be "final and not subject to appeal," plainly indicating that, in the view of the Legislature, such orders would be subject to appeal in the absence of such provision.

A provision contained in another statute that there shall be a right of appeal, a superfluous provision, has by no means the same argumentative force as a prohibition would have: see Maxwell on Statutes, 4th ed. (1905), p. 467.

(2) The maxim "*expressio unius est exclusio alterius*" has been overworked; useful as it sometimes is, it is oftener misleading. I do not think it applies in the present case at all.

The appeal given in the general Act is: (1) on questions of jurisdiction or law only; and (2) only by leave of the Divisional Court. The appeal given by sec. 4(1) of the Act of 1917 is (1) on questions of fact or law and (2) without the leave of the Divisional Court. This is a right given to the city and the railway company, superadded to, not inconsistent with, the right given in the general Act. It cannot be effective to take away from one not

named in the sub-section the right to appeal which he otherwise would have had.

It is not necessary to express an opinion as to whether the city and the railway company are restricted to this special appeal. It may be so. The grant of an appeal (1) as of right and (2) on all points may (3), even if it be final, be considered more than the equivalent of an appeal (1) by leave and (2) only on questions of law or jurisdiction (3) with a further appeal; but no equivalent or substitute is given to the county.

I think we are not concluded from hearing the appeal; we should grant leave and now treat the appeal as properly before us.

The claim of the County of York is based in substance on the agreement of the 6th April, 1894, which will be found as schedule A. to the Ontario statute (1897) 60 Vict. ch. 93.

I may say at once that, in my opinion, counsel for the appellant placed the rights of his client quite too low. This agreement is not simply validated by a statute, but it is itself a statute; sec. 15 of the Act makes the "privileges and franchises thereby created . . . existent and valid . . . to the same extent and in the same manner as if . . . set out and enacted as part of this Act." Whatever difficulties might have been encountered had the agreement been simply validated, there can be none when we remember that the privileges and franchises are given by statute.

The history of Yonge street, built from what is now Queen street to Holland Landing, by Simcoe, in the earliest days of the Province's life, is curious but need not be here detailed—sufficient is given in the lucid and able judgment of the Board. The County of York was from 1865 onward the owner in fee of that part of Yonge street now in controversy, and made certain agreements with the predecessor of the Toronto and York Radial Railway Company—see schedule A. to 56 Vict. ch. 94 (O.) and schedule A. to 60 Vict. ch. 93 (O.), those in the former schedule being "confirmed and declared to be valid" by sec. 2 of the statute, the latter being (as we have seen) made part of the statute.

The Legislature, by the Act (1917) 7 Geo. V. ch. 92, gave to the City of Toronto the power of expropriating the railway and all its real and personal property within the city; but authorised the County of York to make such claim as it might be advised against

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the city for damages by reason of the exercise by the city of its powers so given. The county made a claim as set out in the particulars of claim annexed hereto.

The grounds upon which the Board disallowed the claim seem to be (1) that the county has parted with its ownership of part of Yonge street, and (2) there is no agreement "in gross."

Both may be considered together. I have already pointed out that the rights of the county are statutory under the Act of 1897. They do not depend upon any ownership of the highway, although of course they would not have been given were it not that the county owned the highway. They are "in gross," in the sense in which the expression is used in the reasons for judgment of the Board. So far as any of them becomes valueless by the county alienating the street and ceasing to be the owner, such an alienation is of importance, but only in the view of quantum. The by-law No. 712, referred to, does no more than make certain portions of Yonge street "the property of and . . . owned by" other municipal corporations. It does not operate as a conveyance of anything else than the fee, and the statute under which the by-law was passed does not in any way affect other rights of the county.

This is not at all such a case as the Farnham Avenue case, *Toronto and York Radial R.W. Co. v. City of Toronto* (1913), 25 O.W.R. 315 (P.C.) There by an indenture the county had conveyed to the city the whole of its interests in the portion of Yonge street within the city (p. 320). Here there is no such conveyance.

It is much more like *Vancouver Power Co. Limited v. North Vancouver District Corporation*, [1917] A.C. 598, 36 D.L.R. 462, where such rights as these were held to remain in the original contracting municipality, notwithstanding a statute which provided that the agreement should be adopted and carried into effect by a new municipality.

I can find nothing here which divests the county of the rights given it by statute. The mere transfer of the highway clearly does not: *County of Wentworth v. Hamilton Radial Electric R.W. Co. and City of Hamilton*, 54 S.C.R. 178. (The remarks of Mr. Justice Duff on p. 189 of this case are, I think, misunderstood by counsel for the city; but in any case they do not affect the present case.)

There being nothing to divest the rights of the county, the Board should not have dismissed the claim without giving the county an opportunity of calling witnesses, unless it appears that in no view could a claim for money damages be sustained.

As to paragraph 1, I do not think this claim could possibly be substantiated; 2, 3, and 4 may be difficult if *Village of Brighton v. Auston* (1892), 19 A.R. 305, be considered to apply; but there may be facts shewing that the county will sustain a pecuniary loss by being deprived of the rights there given, and it is reasonably certain that the principle of *Village of Brighton v. Auston* will not be extended—in any event nominal damages may be recoverable: *Village of Brighton v. Auston, ut supra*; Leake on Contracts, 6th ed. (Can. Notes), p. 773.

It is unnecessary to determine, in advance of evidence, whether 5 and 6 may be substantiated, while 7 is certainly such as may be of great value. The contingent right of the county to take the real and personal property of the railway does not depend on the ownership of the fee or of any less interest in the land. The statute of 1897 gives the statutory right to the county, and any difficulty which might arise under the general law from the fact that this property (or some of it) is in another municipality is avoided by this special statutory provision.

The city takes part of the real and personal property of the railway, which on a certain contingency the county is to have; this may be a serious loss to the county, and should be compensated for. The fact that this loss is contingent does not render the damages nominal; *Chaplin v. Hicks*, [1911] 2 K.B. 786 (C.A.), has placed the law in that regard in a safe and, if I may say so, a satisfactory condition.

I would allow the appeal with costs of the motion for leave and argument on the merits, payable forthwith by the city.

I annex to this judgment the claim of the county and the reasons for judgment given by the Board.

KELLY, J.:—I agree in the result.

Leave to appeal granted and appeal allowed.

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CANADIAN GENERAL SECURITIES CO. LIMITED v. GEORGE.

Contract—Sale of Land—Undertaking by Agent of Vendor-company to Resell at Profit within Specified Period—Promise not Incorporated in Agreement of Sale—Independent Collateral Agreement—Authority of Agent—Ratification by General Manager—Powers of—Secret Restriction—Agreement Binding on Company—Statute of Frauds—Oral Evidence of Stipulation—Mistake—Fraud—Enforcement of Collateral Agreement—Payments under Contract of Sale after Breach of Collateral Agreement—Waiver—Amendment—Counterclaim—Damages—Set-off against Balance of Purchase-price.

The plaintiffs, an incorporated company, owning certain lots of land, appointed C. their general manager to supervise the sale of the lots. In the agreement between the plaintiffs and C. it was provided that he had no authority to make any representation as to the plaintiffs' properties other than those contained in their printed matter, and that he should have authority to accept offers for the purchase of lots according to the plaintiffs' price-list. The plaintiffs employed G. to sell their lots. G., in March, 1914, telephoned to the defendant from the plaintiffs' office and induced the defendant to buy two of the lots, upon the express agreement that the plaintiffs would resell the lots not later than the 1st August, 1914, at a profit of \$100 on each lot; G. informed the defendant that he was authorised by C. to make this arrangement. C. was present when G. was telephoning and heard what G. said; C. told G. that he should not have said that the plaintiffs would resell the lots; but, according to the testimony of G.—C. himself was not called as a witness—C. ratified the representation made in his name and ostensibly by his authority. The defendant paid part of the price of the lots, and signed a blank agreement of purchase, which was afterwards filled up by G., but which did not contain any provision as to a resale. G. endeavoured to resell, but did not succeed. The defendant continued to make payments to the plaintiffs until June, 1917. In September, 1917, the plaintiffs launched this action, to recover the balance due under the agreement of purchase, and the defendant set up in his defence the agreement to resell:—

Held, that the case was one of an agreement for the sale of land with an independent collateral agreement, and it was not necessary that the collateral agreement should appear in the agreement for sale.

- (2) That C., as general manager, had ostensible authority to make or ratify the collateral agreement, and any secret restriction of his authority would not affect the defendant, who relied upon his being the general manager.
- (3) That the collateral agreement, being an agreement to sell land, not for the sale of land, was not within the Statute of Frauds.
- (4) That, if the collateral agreement was within the statute, the defendant being induced to sign a written contract for the purchase of land on the faith of the performance of a collateral stipulation, oral evidence of that stipulation should not be excluded by reason of the statute; and the plaintiffs should not be allowed to enforce the promises made to them in the contract for purchase without being bound by their own promise.
- (5) That, even if G. was in a sense acting for the defendant, to whom he was related by blood, the defendant was not affected by G.'s omission to include the promise to resell in the agreement of sale: if it was intended to be included, it was left out by mistake; and to allow the plaintiffs to take advantage of the omission would be a gross fraud.
- (6) That the agreement to resell was, therefore, binding on the plaintiffs.
- (7) That the two agreements were independent; and the defendant, by paying on the agreement of sale after there was a breach of the agreement to resell by the 1st August, 1914, had not put it out of his power to enforce the latter agreement.

- (8) That the plaintiffs were entitled to judgment for the amount due under the agreement of sale, and the defendant should have leave to amend by counterclaiming upon the agreement to resell, and judgment for damages for breach of that agreement, with a set-off *pro tanto*.
 (9) That the damages should be the difference between the amount the defendant should have received for the lots had the plaintiffs carried out their contract (the purchase-price plus \$200), and the value of the lots.

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ACTION to recover the principal, interest, and taxes due under an agreement made between the defendant and the Port Weller Securities Corporation, and by that company assigned to the plaintiff company.

November 28, 1917. The action was tried by MASTEN, J., without a jury, at Toronto.

G. G. S. Lindsey, K.C., and W. R. Wadsworth, for the plaintiff company.

L. F. Heyd, K.C., for the defendant.

January 7, 1918. MASTEN, J.:—The plaintiffs' claim, as endorsed on the writ of summons (which forms part of the record), is for the balance of principal, interest, and taxes due under an agreement dated the 31st March, 1914, made between the defendant and the Port Weller Securities Corporation Limited, which agreement was assigned by the said Port Weller Securities Corporation to the plaintiffs on the 5th September, 1917.

The following are the particulars:—

"Agreement dated the 31st March, 1914, whereby the defendant covenanted and agreed to purchase lots numbers 554 and 555, block E., plan 112, in the township of Grantham, in the county of Lincoln:—

" To balance of principal	\$1,837.50
" July 31-17. To interest to date	368.85
" Taxes	4.00

—
 "\$2,210.35

" together with interest on the said sum of \$2,210.35 from the 31st day of July, 1917, to the date of judgment, at the rate of 6 per cent. per annum."

The defendant files an affidavit along with his appearance in answer to this special endorsement, which is as follows:—

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"I, Angus F. George, of the town of Port Elgin, in the county of Bruce, merchant, make oath and say:—

" 1. One Erle Sutherland George, an agent for the Port Weller Securities Corporation Limited, negotiated with me for the purchase of the lots in question.

" 2. It was agreed between the said Erle Sutherland George and myself that I was to pay \$2,100, which was to be paid as set forth in the paper-writing now produced and shewn to me marked with the letter A.

" 3. There was an additional term to the said agreement that the said Port Weller Securities Corporation Limited would sell the said lots for me, at a profit, and the said Erle Sutherland George assured me that he had authority to make such contract.

" 4. Relying upon the statements of the said Erle Sutherland George, I signed the alleged agreements, which were not then filled out, and forwarded them to the said Erle Sutherland George in Toronto, expecting that the terms of the agreement, as herein-before mentioned, would be correctly set forth in the said agreement.

" 5. Some period of time elapsed before one of the alleged agreements was returned to me. I did not pay any attention to the matter; in fact did not read the agreement over, relying upon the agreement of the said Erle Sutherland George that the said agreements would be correctly set forth in the terms of the agreement made by me.

" 6. I frequently met the said Erle Sutherland George, who was at the time an employee of the said Port Weller Securities Corporation Limited, and requested him to sell the said lots.

" 7. The said Erle Sutherland George made efforts to sell the same, and requested me to continue the payments which fell due under the said agreements, but said that in consequence of the war there was difficulty in disposing of lands of this description.

" 8. I did not read over the said agreement until I was served with the writ of summons herein, when I discovered that the exhibit now produced and shewn to me marked with the letter A. did not contain the agreement that the said Port Weller Securities Corporation Limited would sell the said lots at any time I desired at a profit on the amount that I agreed to pay for them."

And upon the record so constituted the case was tried.

The defendant resides at Port Elgin. His cousin, one Erle

George, was formerly employed by the Port Weller Securities Corporation Limited, as an agent to secure purchasers for the lands of that company. In pursuance of his employment, he sought to induce the defendant to become the purchaser of lots 554 and 555 in block E., being certain lots then owned by the Port Weller Securities Corporation Limited, and sent him blank forms of purchase-agreement.

Erle George, as such agent, then telephomed from Toronto to the defendant at Port Elgin. Some particulars of the telephone conversation are given in evidence. The defendant in his evidence says that he made notes of the conversation, and that Erle George, acting as the agent of the Port Weller Corporation, assured him over the telephone that the company would guarantee the resale of the lots by June, and not later than the 1st August of that year, at a profit of \$100 on each lot, and that this statement induced the defendant to purchase.

Erle George is also called, and his evidence substantially accords with that given by the defendant. He says that he had no connection with the company except as an agent to try and sell the lots, and that he never sold any lots on behalf of the company except these, though he is still trying occasionally. At the time when this transaction arose, there was no written agreement between him and the Port Weller Securities Corporation. My note of his evidence is, that he says that he told the defendant, if he could carry these lots for two or three months, the company would resell them for him. The witness also says that he told the defendant to sign in blank the printed forms of agreement which he had mailed to him the day before and send them back, and that he (Erle George) would fill them in, and that this was agreed. He says there was no seal on them when returned, but he put the seal on them himself.

The evidence further discloses that on the day following the telephone conversation the papers were returned to Erle George by the defendant, signed in blank, and that he filled them up; and no satisfactory explanation is afforded of why the term respecting the resale was not inserted in them. Having filled them up, he then returned one copy of the agreement to the defendant, and retained the other. The agreement so filled up and executed by both parties was put in as exhibit 2 at the hearing.

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Subsequently, on the 5th December, the Port Weller Securities Corporation Limited assigned the agreement, and all its rights and interest under it, to the Canadian General Securities Company Limited.

There is no evidence before the Court that either the Port Weller Securities Corporation or the Canadian General Securities Company had at this time any notice or knowledge of the special assurance which had been given by Erle George to his cousin in the course of the telephone conversation.

The action was presented before the Court as for rescission of the contract on the ground of a false representation. There is, however, no false representation of any existing fact. What is really disclosed in the evidence is the promise alleged to have been made by the vendors' agent to the defendant as purchaser, that the vendor company would resell on his behalf within three months at a profit of \$100 on each lot; and the complaint is, that this promise was not inserted in the written contract, and that therefore the whole transaction should be rescinded.

The further evidence discloses that one copy of the agreement so filled up was returned to the defendant, who asserts that he put it away in his vault without looking at it, and was unaware that it did not contain the promise relative to a resale of the property on or before the 1st August, 1914, until he was actually served with the writ of summons in this action.

I think the evidence establishes that such conversation as is described took place. I find as a fact that what was here done operated as an appointment by the defendant of Erle George as his agent to fill in the agreement; and that, through Erle George, the defendant had constructive notice of what was inserted in the agreement.

I am unable to find, as requested by the defendant, that he was unaware of the provisions of the printed agreement (exhibit 2); having received the document and having kept it in his own custody from 1914 until the day of the issue of the writ, I think he must be presumed to be aware of its contents; and I do not credit his testimony when he says that, understanding that the bargain was that these lots were to be resold on his behalf by the company not later than August, 1914, he continued making the payments in respect of them down to a very much later date.

I find that, in filling up the agreement in question, Erle George did not act as the company's agent; I find that his sole authority from the Port Weller Securities Corporation Limited was to procure purchasers of their land, and that he had no authority whatever to enter into such an agreement as is set forth in the evidence, to undertake to sell lands within a limited time. Indeed, I doubt very much whether the managing director of the company had any such authority; any such contract, if made, must, I think, have been made or sanctioned by the board of directors.

Neither reformation nor rescission of the contract is here possible, owing to the fact that the lands and the agreement and all rights thereunder have been transferred to the Canadian General Securities Company, and the parties cannot be restored to their original positions.

Not only so, but I agree with the contention put forward on behalf of the plaintiffs as a conclusion of law, that where parties are making an agreement by parol and subsequently reduce it into writing, the writing construes and must be taken to represent the whole contract as previously made. When parties discuss a question in the evening, and on the next day put down the result in writing, the inference is that they mean to abide by what they have written; and, if there is any discrepancy between the words and the writing, there can be no doubt that the writing will prevail.

The memorandum which was made and signed by both parties was, I think, intended to set out the terms of the contract and to be acted upon by both parties, and it became, when it was so acted upon, the real contract.

The telephone conversation goes for nothing if it was intended that the agreement should be reduced to writing and that was afterwards done.

These are the principles of law as they were expressed by the Exchequer Court in the case of *Knight v. Barber* (1846), 16 M. & W. 66, and have been approved in subsequent cases.

The inference to be drawn, in my opinion, from the facts, is, that the term respecting resale was understood by the parties as a mere representation and not as a warranty.

It is contended on the part of the defendant that the agreement which he seeks to enforce is collateral to the proposed dealings with the land; that it is not within the Statute of Frauds; and that

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an action will lie for non-performance of a special promise to be performed after execution; and, on the authority of *Clarke v. Latham* (1915), 25 D.L.R. 751, counsel for the defendant contends that Erle George was the authorised agent of the Port Weller Securities Corporation, not merely to secure a purchaser for the lands, but also to enter into the special promise or agreement here in question.

In my view, the fact, which I have found above, that Erle George had no authority to enter into an agreement of this kind or to bind the company by any such arrangement, is conclusive, and distinguishes this case from the case of *Clarke v. Latham*, the essential point of which is stated on p. 753: "I think the law is clear that where an agent is clothed with ostensible authority to carry out a transaction, no private instructions prevent his acts, within the scope of that authority, from binding his principal." I give my unqualified adherence to the principle so stated, but I think it has no application to the parties in this case.

For these reasons, I am of opinion that the defendant has failed to make out any defence to which legal effect can be given, and that the plaintiffs are entitled to judgment for the amount claimed by the endorsement on the writ, namely, \$2,210.35, with interest from the 31st July, 1917, to the date of judgment, at the rate of 6 per cent., and costs.

The defendant appealed from the judgment of MASTEN, J.

February 25. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

W. J. McLarty, for the appellant, argued that the oral agreement to resell was collateral to the proposed dealings with the land and there was no necessity for it to appear in the agreement for sale: *DeLassalle v. Guildford*, [1901] 2 K.B. 215.* As to the Statute of Frauds, counsel contended that it did not apply, as the contract was one to sell land, not one for the sale of land: 20 Cyc., pp. 234, 235, notes 34, 35. Erle George was the authorised agent of the Port Weller Securities Corporation, not merely to secure a purchaser for the lands, but also to enter into the special agreement

*See *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30.

in question: *Clarke v. Latham*, 25 D.L.R. 751; *Duke of Beaufort v. Neeld* (1845), 12 Cl. & F. 248; *Lennard's Carrying Co. Limited v. Asiatic Petroleum Co. Limited*, [1915] W.N. 119; *McKnight Construction Co. v. Vansickler* (1915), 51 S.C.R. 374, 24 D.L.R. 298. George did not act for the defendant as agent at all.

G. G. S. Lindsey, K.C., and *W. R. Wadsworth*, for the plaintiffs, respondents, contended that George had no authority to make the representation that he did: *Earl of Sheffield v. London Joint Stock Bank* (1888), 13 App. Cas. 333. George was the agent of the defendant to fill in the written agreement. The Statute of Frauds applied, and the whole agreement to be looked at was in the written instrument: *Knight v. Barber*, 16 M. & W. 66. The defendant cannot set off damages against the debt: *Cooke & Sons v. Eshelby* (1887), 12 App. Cas. 271; *London Joint Stock Bank v. Simmons*, [1892] A.C. 201.

McLarty, in reply, referred, upon the question of the application of the Statute of Frauds, to *Boston v. Boston*, [1904] 1 K.B. 124.

March 25. The judgment of the Court was read by RIDDELL, J.:—This is an appeal from the decision of the trial Judge, Mr. Justice Masten, in favour of the plaintiffs.

The plaintiffs' claim is on a specially endorsed writ, for principal, interest, and taxes due under an agreement made between the defendant and the Port Weller Securities Corporation, and by that company assigned to the plaintiff company. Most of the facts of the case are sufficiently set out in the reasons for judgment of my brother Masten.

The Port Weller Securities Corporation owned certain lots in the township of Grantham, which it sold to the plaintiffs by an agreement of the 13th December, 1913—the Port Weller Securities Corporation allowing the plaintiffs to use its name in effecting sales of the lots etc.; the plaintiffs appointed William T. Clancy their "general manager to supervise the sale of the company's lots." In the agreement between the plaintiffs and Clancy it was expressed that he had no authority to make any representations as to the company's properties other than those contained in the company's printed matter, and that he should have authority to accept offers for the purchase of lots according to the company's price-list.

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The plaintiffs, using the name "The Port Weller Securities Corporation," employed E. S. George (the defendant's cousin) to sell their lots. Apparently there was a contest between the agents of the plaintiffs for a \$100 bonus. George in Toronto called up the defendant (who lives in Port Elgin) by telephone and induced him to buy two of the plaintiffs' lots for \$2,500, under the express agreement that the company would resell these lots by the end of June and not later than the 1st August, so that he would make \$100 on each lot—George informed the defendant that he was authorised by the manager, Clancy, to make this arrangement. Clancy was present with George in the Toronto office of the plaintiffs when this representation was made—George's account is as follows:—

"Q. What passed between you and Mr. Clancy immediately after the conversation was finished? A. When I hung up the receiver Mr. Clancy was sitting back a little piece in the office. He came in and said, 'George, you should not have said that the company will resell the lots.' I said, 'Why? I understood the company was to resell the lots.' And he said, 'No, George, you should not have said the company will resell the lots, because we are selling lots, not reselling them.' I says, 'I never knew that before, I am glad you told me, because I have a couple of deals on this way, and I will correct them, but, as far as Gus's arrangement goes, it must stand; the others I will change and make sure that the company is not bound by them.'

"Q. What else was said? A. I don't know just exactly how he worded it afterwards, but it was really that there was no danger about it anyway, that we would take care of them, that they would be taken care of. The gist of it was, that it was allowed."

Clancy was not called at the trial. On the hearing of the appeal it was suggested to counsel for the plaintiffs that Clancy's evidence should now be taken, but this suggestion was declined. The learned trial Judge has found as a fact that the conversation alleged did take place; and there can be no room for doubt that Clancy by implication ratified the representations made in his name and ostensibly by his authority.

George had already sent two blank agreements to the defendant; and he asked him to sign these in blank and send them down to Toronto: "If you will fill it in (i.e., sign) I will take care of it

for you and see to it." "I told him to sign these things in blank, and I would fill them and see that they were filled up and handed in."

The defendant signed the agreements in blank, and sent them with the down-payment to George; George filled in the numbers of the lots, added a seal, and handed in the documents to Clancy, who affixed the name of the Port Weller Securities Corporation; one duplicate was sent to and kept by the defendant. George says concerning the undertaking to resell:—

"It never occurred to me to put this in. I relied on what Mr. Clancy had done. If you will pardon me, I was green in the real estate business. I knew nothing about it. I just filled in the application, handed it in, and it never occurred to me that what I guaranteed had anything to do with the application" (i.e., the agreement).

George tried to sell the lots on several occasions, and Clancy said, "We will speak to the rest of the agents and get them to assist in the sale of this thing." In June, in conversation with Clancy, the defendant told Clancy that he did not buy the lots to hold for business purposes, but he had only taken them "because they were going to resell them for me." Clancy does not seem to have contradicted this statement. The efforts to sell the lots failed: the Great War came on, and "it was impossible to get any person to look at them."

The defendant went on paying money to the plaintiffs till June, 1917; in July, 1917, the plaintiffs sent him an account shewing a balance of \$2,235.35 owing: the defendant paid \$25, and then ceased paying. On the 5th September, the plaintiffs took a formal assignment from the Port Weller Securities Corporation (as the agreement had been made in the name of that corporation), and launched this action.

It seems to me that we have here the case of a sale of land with an independent collateral agreement, not unlike such cases as *De Lassalle v. Guildford*, [1901] 2 K.B. 215 (C.A.), and others mentioned in the notes to Halsbury's Laws of England, vol. 7, p. 528, para. 1058. There is no necessity for such a contract to appear in the agreement for sale. It is, however, objected that there was no authority in George to make such a contract; but that is answered by Clancy's ratification. Clancy being made

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general manager to sell the plaintiffs' land, the secret restriction of his authority (if there was such) would not affect the defendant, who relied upon Clancy being the general manager: *McKnight Construction Co. v. Vansickler*, 51 S.C.R. 374, 24 D.L.R. 298; *Vansickler v. McKnight Construction Co.* (1914), 31 O.L.R. 531, 19 D.L.R. 505; *Clarke v. Latham*, 25 D.L.R. 751, and cases cited. It is impossible, I think, to hold that the general manager of a company has not the power to make such a contract for his company as is here disclosed.

Then the Statute of Frauds, sec. 4 (sec. 5 of our statute), is set up as an answer. But the contract is not one of sale of land but a contract to sell land, and that is not within the statute—20 Cyc., cases mentioned in notes 34 and 35 on pp. 234 and 235—just as there is no need of a writing to appoint an agent to sell lands—Fry on Specific Performance, 5th ed., p. 269, para. 526, and cases mentioned in notes 4 and 5.

If it should be considered that such an agreement is within the statute, another principle may be appealed to:—

"If one be induced to sign a written contract for the . . . purchase of land on the faith of . . . the performance of some collateral stipulation, oral evidence of the . . . stipulation so agreed upon will not be excluded by reason of the statute:" Williams on Vendor and Purchaser, 2nd ed., vol. 1, p. 12, and see cases in note (m)—*cf.* Dart on Vendor and Purchaser, 7th ed., vol. 1, p. 224. And the party making the collateral promise will not be allowed to enforce the promises made to him in the contract for purchase without being bound by his own promise: *Pember v. Mathers* (1779), 1 Bro. C.C. 52, 2 Dick. 550; *Pearson v. Pearson* (1884), 27 Ch. D. 145, 148.

Nor do I think any difficulty arises from the circumstance that George was in a sense acting for the defendant, when he was acting for the plaintiffs in filling in the blanks in the agreement. Either it was intended that the contract to resell should appear in the agreement, or it was not—if not, *cadit questio*: if it was, it was left out by mistake.

Moreover, to allow the plaintiffs to take advantage of the omission would be a gross fraud.

For these reasons, I think the contract to sell for the defendant was binding on the plaintiffs.

It is, however, argued that the defendant, by paying on the agreement after there was a breach of the contract to resell by the 1st August, has put it out of his power to enforce the contract made with him.

Were the agreement on his part to pay the price of the land to the plaintiffs and theirs to resell the land for him dependent, there would be much force in this argument.

But *Neveren v. Wright* (1917), 39 O.L.R. 397, 36 D.L.R. 734, and the cases there cited, shew that they cannot be considered dependent. The case is that there were two independent promises, each of which could be enforced by the promisee without reference to his own promise. The payments by the defendant may well be considered an acknowledgment of his liability to pay, but they are in no sense a waiver of his right to enforce the contract with him.

I think the case must be treated as though in the agreement for purchase there had been an express covenant by the plaintiffs to resell the land for the defendant on or before the 1st August, 1914, so as to realise for the defendant a profit of \$100 on each lot.

The appeal should be allowed so far as the claim for damages for breach of the agreement to resell the lots is concerned; and, if the parties cannot agree, it should be referred to the Master to determine these damages—the judgment in favour of the plaintiffs should stand, but the damages above mentioned (if any) should be set off. Success being divided, there should be no costs of action or appeal—if a reference should be necessary, the Master should dispose of the costs thereof.

It will be seen that I propose to deal with the case as though the collateral agreement had been pleaded as a counterclaim; in case the matter goes further, it may be thought advisable to change the pleadings accordingly—leave should be given for that purpose.

The damages to be found by the Master will, of course, be the difference between the amount the defendant should have received for the lots had the plaintiffs carried out their contract (*viz.*, the purchase-price and \$200 added), and the value of the lots.

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[APPELLATE DIVISION.]

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Fraud and Misrepresentation—Agreements to Purchase Land from Company—Responsibility of Agent for Reckless Statements—Evidence—Findings of Trial Judge—Rescission of Agreements—Damages—Moneys Paid by Purchasers—Judgment Previously Recovered against Vendor-company Construed as for Return of Moneys Paid upon Failure of Consideration—Rule as to Joint Tort-feasors not Applicable.

The plaintiffs agreed to purchase from the defendants certain lots of land in Saskatchewan, and paid moneys to the defendant company on account of their purchases. In these actions they alleged that they had been induced to purchase by false and fraudulent representations made to them by the defendant M. and one S., an agent of the defendant company; and they claimed a declaration of the rescission of the contracts, the return of the moneys paid by them, and damages for fraud and misrepresentation. The defendant company did not defend; and, when the actions first came on for trial, the Judge directed judgment to be entered for the plaintiff in each action against the defendant company for the amount paid by each plaintiff with interest and costs, and endorsed the records with memoranda to that effect, adding, "This without prejudice to further prosecution of action against either defendant." The trial of the actions as against the defendant M. was then postponed. The actions again came on for trial, before SUTHERLAND, J., who found in favour of the plaintiffs and gave judgment against the defendant M., declaring that the contracts were rescinded, and for the recovery by the plaintiffs of the amounts paid by them, as damages resulting from the misrepresentations which he found to have been made by the defendant M. :—

Held, on appeal, affirming the judgment of SUTHERLAND, J., that the defendant M., with the intention of inducing the plaintiffs to purchase the lots, and so that he might earn a commission on the purchase-price, recklessly and without knowing whether they were true or false, made statements, upon which the plaintiffs acted; and, as the statements turned out to be false, M. was responsible to the same extent as if he had asserted what he knew to be untrue.

Derry v. Peek (1889), 14 App. Cas. 337, followed.

Held, also, that the judgment against the defendant company did not preclude the prosecution of the action against the defendant M.: that judgment should not be construed as having been pronounced on the claim for damages for deceit, but on the claim for a return of money received on a failure of consideration.

Goldrei Foucar and Son v. Sinclair (1917), 34 Times L.R. 74, [1918] 1 K.B. 180, followed.

ACTIONS by the purchasers of lands from the defendants for rescission of the contracts of purchase, the return of the moneys paid by the plaintiffs respectively, and damages for fraud and misrepresentation.

As against the defendant MacPherson (judgment having previously been given against the defendant company) the actions were tried together, without a jury, by SUTHERLAND, J., at Stratford.

R. S. Robertson, for the plaintiffs in each case.

R. T. Harding, for the defendant MacPherson in each case.

August 2, 1917. SUTHERLAND, J.:—By consent these actions were tried together, the evidence taken in each case, so far as possible, to be applicable to both. The actions were commenced by writs of summons issued on the 11th January, 1915. The defendant company did not appear, though duly served with the writ and later with notice of assessment of damages.

The actions first came on for trial on the 4th May, 1915, before the late Chancellor, who directed judgment in the Yost case to be entered for the plaintiff as against the defendant company for payment of \$1,100 and interest from dates of payment and costs of action, and for the plaintiff Dannecker against the said defendant company for \$834 and interest from dates of payment and costs of action.

The plaintiffs having applied to the Chancellor to postpone the trials of the actions as against the defendant MacPherson, the Chancellor endorsed on the records the judgments against the company as already indicated, with this addition in each case: "This without prejudice to further prosecution of action against either defendant."

In and prior to the year 1913, the defendant company, a real estate agency, with head office in the city of Winnipeg, in the Province of Manitoba, and claiming to be the owners of certain lots in the town of Canora, in the Province of Saskatchewan, a small town with glowing expectations in the opinion of some people, and particularly of real estate agents, had appointed a firm of real estate agents doing business in the city of Toronto, as Spicer Graham & Company, to sell some of these lots for them.

On or before the 16th April, 1913, one Sweet, a real estate agent, and Spicer, one of the firm just mentioned, went to Stratford and met the defendant MacPherson, a financial agent and man of affairs there, and a fellow-townsmen of and well and favourably known to the plaintiffs. They enlisted the co-opera-

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tion and assistance of MacPherson in connection with the proposed sales of the lots. It is said that Spicer Graham & Company were to get a commission of 16 per cent. on sales made by them for the defendant company, and that the arrangement arrived at between Spicer and Sweet and MacPherson was that, for the latter's assistance in introducing likely purchasers and furthering the sales to them, he was to get 20 per cent. commission thereon, out of which he was to pay 2 per cent. to Sweet, and also any expenses incurred in connection with the sales. Part of the arrangement was also that he should take over any lots or stock in any company, received as part payment on the sale of lots.

Some sales were made in or in the vicinity of Stratford before the last-named date, as a result of which the defendant MacPherson earned and received commissions.

The plaintiff Dannecker is a baker and confectioner, doing a good business at and around Stratford, and with some experience in the purchase and sale of real estate.

The plaintiff Yost is a carriage-builder and blacksmith, and apparently a shrewd and intelligent man. He had previously been a purchaser of western lands. It is apparent from the evidence that they knew the lots were of a speculative value, and were dealing on the basis of their expectation of a rapid rise in their value.

Dannecker says that on or about the 15th April, 1913, Sweet, whom he had not known before, called at his place of business with the defendant MacPherson, and the latter introduced him as representing the defendant company in selling lots in Canora. He says that a map was shewn, and the lots pointed out as centrally located, of good value, high and dry, and that the town was a thriving town and going ahead. He says that MacPherson mentioned that he had been to see him once before with lots to sell in another place, which lots had meantime increased in value, and that these lots were even better. He says also that MacPherson said he had been through the Canora district, and that the lots were high and dry. He says further that, while he saw the map, no copy of it was left with him. He also says that both stated that the title was good and direct from the "Government." It was arranged that Sweet was to call next day, and he did. Dannecker had concluded from the representations made that the

lots would be a good investment at the prices mentioned. Sweet called next day and made a sale of four lots for \$1,000. The plaintiff paid to him \$500 on account, receiving a receipt as follows:—

“Agent’s Receipt.

“Formal receipts will be issued by the company immediately the order is entered.

“Stratford, April 16, 1913.

“Lots 5, 6, 7, & 8, block 79.

“Property Canora, Sask.

“Received of Conrad Dannecker, Esq., the sum of five hundred dollars being one-half payment on above.

“J. E. Sweet, Agent.”

“\$500.00.

“Make all future remittances direct to International Securities Co. Ltd.”

Dannecker later received a letter, dated the 23rd April, 1913, on paper having in large print at the top “International Securities Company Limited,” and in similar print lower down “Spicer Graham & Company, Mgrs.,” acknowledging receipt of the \$500 as the first payment on the lots in question purchased from Sweet, and stating: “The official receipt and contract will be forwarded from the head office in due course.” The formal agreement, dated the 10th June, 1913, was enclosed to the plaintiff Dannecker in a letter bearing date the 11th June. In this agreement Spicer Graham & Company appear as vendor and the plaintiff Dannecker as purchaser; it contains the statement, “All payments to be made at the office of the vendor in the city of Toronto in the Province of Ontario;” and it contains a covenant on the part of the purchaser that he will pay the remaining instalments, namely, \$166.65, on the 1st November, 1913, and a like amount on the 1st February and the 1st May, 1914.

The document also contains an agreement on the part of the vendor to convey to the purchaser by transfer “under the Torrens system or under the Land Titles Act, whichever the case may be, without covenants other than against incumbrances by the vendor,” and contains also a clause that “time shall in every respect be of the essence of this agreement.” The document is under seal and signed as follows, “International Securities Company Limited” (apparently stamped on with a rubber stamp),

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below which appears in printing "Spicer Graham & Company," underneath which is the signature "W. C. Graham, Sec.-Treas." The plaintiff Dannecker also signed copies, returning one to Spicer Graham & Co.

The plaintiff Yost says that on the evening of the 13th April, 1913, Sweet and MacPherson called at his house, and the latter introduced the former as representing the defendant company of Winnipeg. He says that both did a good deal of talking, that a map was got out shewing the town of Canora, that they represented it to be a rapidly growing town with seven mills in it, three elevators, a railway centre; pointed out the post-office, and that the lots were three blocks from it, represented the lots as cheap lots, a cheap buy and worth more money than they were offering them at; that if he did not take them he would lose his chance, as the town was rapidly growing; that the lots were "central lots in the centre of the town." They represented to him that he would get a Government title. He says that that evening he was induced to sign "a little agreement or paper written out by Sweet," and taken away by him, by which he (Yost) was to buy three lots at \$1,100. No money was paid. He says that next morning they came to his shop; and, having considered the matter overnight, he told them the deal was off, as made against his will, and that he threw it up. He says that they began to talk again, the defendant MacPherson being the principal speaker, and stated that the place was rapidly growing, that he (Yost) would miss his chance and never get such a chance again. He says that finally he was out-talked, went to the bank with them, drew \$550, paid it to Sweet in the defendant MacPherson's presence, and got a receipt as follows:—

"Agent's Receipt.

"Formal receipt will be issued by the company immediately the order is entered.

"Stratford, April 28th, 1913.

"Property Canora, Sask.

"Lots 13, 20, 21, block 75.

"Received of Henry Yost, Esq., the sum of five hundred and fifty dollars being one-half payment on above.

"\$550.00,

J. E. Sweet, Agent.

"Make all future remittances direct to International Securities Co. Ltd."

Later he received a letter, dated the 30th April, 1913, from Spicer Graham & Company, similar to the one sent to Dannecker, and later a letter, dated the 11th June, similar to the one also sent to Dannecker, and enclosing an agreement similar in form for execution.

On the 28th July, 1913, and the 31st July, 1913, letters were written from Winnipeg to the plaintiffs Dannecker and Yost respectively, by one A. E. Reid, and received by them in due course of mail, notifying them that their respective agreements of sale, "issued by Messrs. Spicer Graham & Company of Toronto," had been assigned to him, and intimating that future payments should be sent to him at 845 Somerset Building, Winnipeg. It was said that Reid was an employee of the defendant company, and the letters were written on their paper.

Sweet was not called as a witness at the trial. The account of the defendant MacPherson as to what took place is as follows: He admits going with Sweet to Dannecker's, and that a map and some literature were produced, shewn, and discussed. He says that he himself told Dannecker that large towns had grown up along the lines of the Canadian Pacific Railway, and the same thing would probably occur as to the Grand Trunk Pacific, the country being better, if anything, along that line. He says that he had driven through that part of the country in 1906, and formed that impression. He says that he said to Dannecker that if he wished to speculate in town-sites the chances were as good, if not better, than they had been along the line of the Canadian Pacific Railway. He says that Sweet said there would be a Government title; and, upon hearing him make that statement, he said, "That means a Torrens title."

He denies that he said the lands were high and dry, or that Canora was thriving, or that the property was increasing rapidly in value. He adds that there was a long talk between Dannecker, Sweet, and himself, and that Sweet was a vigorous salesman.

As to Yost, MacPherson's story is, that he made an appointment with him in the latter's shop, that he and Sweet would go to his house in the evening, and they went. He admits that he said to Yost that these lots would be better speculation than lots in the town of Saskatoon, and said this because he understood

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that he had bought lots there at a pretty high figure. He says that again the question of title came up, and that Sweet stated that the title would be from the Government, but added that that would be a Torrens title. He says, with reference to the location of the lots, that they were pointed out on the map, and their location indicated as compared to the post-office and the like—that this was done by Sweet. He says he does not think it was said that the lots were worth more than the price they were being offered at for sale. He said he did not say it at all events. He thinks that Sweet said Canora was growing rapidly by reason of the two railways and the good country around it. He says that Yost consulted his wife and daughter, who were present, and that the latter urged him to buy. Thereupon he signed the memorandum or receipt already referred to. He says that next morning when he saw them, he intimated that the deal was off and very distinctly and definitely refused to carry it out. He said that he himself then said to Sweet, "We had better leave," and he himself did leave. He says that Sweet remained, and he had nothing more to do with the matter afterwards. As a matter of fact, tax notices were sent to him, indicating apparently that he was assessed as owner.

A document was, however, produced at the trial and admitted to have been signed by him, as follows:—

"Application for Purchase of Lots.

"International Securities Co. Ltd.,

"Somerset Building, Winnipeg, Manitoba.

"Date April 14th, 1913.

"I hereby make application to purchase the within described lots.

"Property

"Canora, Sask.

"Lots 5, 6, 7, 8,

"Block 79,

"Price \$800.

"Payment \$300.

"Cheque

"Currency

"Money order

"In the event of the above lots being sold, I authorise you to select for me the best of the lots remaining unsold nearest to those which I have selected, and at the same price.

"It is understood that the title to these lots must be by good and valid deed and that no interest will be charged on deferred payments.

"On receipt of my application you will please make out and forward to me your formal 'Agreement for Sale' which I will sign and return.

"Terms

"Bal. 6, 9 &
12 months.

"I agree to purchase the above described lots with the understanding that while the company guarantees the correctness in all material particulars of its advertising matter as to the said lots, it is not bound by the representations of its sales-agents if other or different statements or representations are made than those contained in its printed matter.

"It is important that full name and occupation be given.

"Occupation, Financial
Agent.

A. J. MacPherson,
"Purchaser.

"Witness, J. E. Sweet,
"Agent,

"P.O. Address, Stratford, Ont.

"Total value of lots to be purchased under this application \$800.00."

A similar document bearing date the 28th April, 1913, referring to the Yost lots, and signed by the defendant MacPherson, was also produced. His explanation as to how he came to sign these papers is as follows. Sweet and Spicer, he says, came to him some time before the sales to Dannecker and Yost, and stated that the defendant company had objected to the way the sales of lots had been made in the town of Biggar, and wanted the sales in Canora put through in the name of a third person, as they suspected that the Toronto agents were getting more commission than they should, and therefore wanted the sales to be shewn as going through the name of a third person. He said he had done this in the case of some previous sales for them; and, without much thought, signed these applications with respect to the lots in question. He was not able to give any satisfactory explanation as to why he did it. He says that agreements were actually issued to him which he got about a month later, and that he then assigned them over to Spicer Graham & Company. MacPherson received his commissions on the sales in question from or through Spicer Graham & Company. He says that Spicer Graham & Company intended to put the sales through with the defendant company on the basis of his agreement with them. He says, however, that

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they intended to provide for his commission in this way. His commission on the Yost deal, on the basis of 20 per cent., would be \$220. In his own ledger he gives credit for this commission at \$225, apparently for his own commission on this sale. He admits that personally he did not know the value of lots being sold to the plaintiffs, and that he took an active part in introducing Sweet to them and promoting the sale.

On the 20th October, 1913, the plaintiff Yost wrote to the defendant company, and in reply received a letter, dated at Toronto, informing him that future payments should be made to A. E. Reid, "as he holds the agreement of sale. You may send him a money order or cheque and he will send you a receipt for same."

The plaintiff Yost completed his payments, sending the last instalment of \$275 on the 1st May, 1914, to Reid, and asking for his conveyance. On the 5th May, 1914, Reid replied stating: "Owing to different transfers having to be executed, there may be some delay in finally getting out your papers."

It appears that the title never was in the defendant company, but stood in the name of one Andrews in trust. When the plaintiffs began, in the summer of 1914, to communicate directly with the defendant company at Winnipeg, as to the title, they were told by the company that they, the plaintiffs, had never been heard of by the defendant company there in connection with the lots in question. The company repudiated its alleged signatures to the agreements held by the plaintiffs, intimating that MacPherson was the purchaser from the company and was still owing \$800 on the lots.

The plaintiffs had made all their payments when they learned that the defendant company was taking this position. Thereupon the plaintiffs employed solicitors and endeavoured to get the title from the defendant company or some satisfaction, failing which they brought these actions. In each case they allege that they were induced to purchase the lots in question through the fraud and misrepresentation of the defendant MacPherson and Sweet, an agent of the defendant company.

The specific allegations of fraud are set out in paragraph (6) of the statements of claim, which in each case is as follows:—

"The plaintiff alleges that he was induced to buy said lots by

the defendant MacPherson and said J. R. Sweet falsely and fraudulently stating and misrepresenting to him that the defendants the International Securities Company Limited were at that time the owners of the said lots, and that his title to the same would come direct to him from the Government, when the fact was that the defendant MacPherson was the owner of said lots at the time of the sale to the plaintiff, he having previous to that time purchased the same from the defendant company; that the said lots were high and dry, and were close to the centre of the town, and were worth much more than he was paying for them, and that the town of Canora was a thriving town, increasing rapidly in value, all of which statements were untrue; and that he is entitled to a rescission of the contract for the purchase of the said lots and to repayment of his money and damages for fraud and misrepresentation."

And the plaintiffs ask from the defendants in each case: (1) repayment of the purchase-money and interest; (2) a rescission of the contract and repayment of the money and interest; and (3) damages for fraud.

The defendant MacPherson in his statement of defence denies that he made any false or fraudulent misrepresentations. He further denies that he ever acted as agent for the defendant company, or that the lots in question were transferred to or purchased by him on the 1st November, 1913. Why this date is mentioned, I am unable to say.

It is clear that the defendant MacPherson knew that the defendant company, as alleged principals of Spicer Graham & Company, with whom he associated himself for the purpose of making sales of the lots in question, were prepared to sell the said lots, not at the prices named in the agreements with the plaintiffs, but at prices much less, namely, the prices mentioned in the applications to purchase, signed by himself.

Ordinarily, and in default of any different arrangements made with proposed purchasers, agents receive their commissions from their principals, and based upon and usually out of the price fixed as between such principals and purchasers. In the first place, therefore, Spicer and Graham would be entitled to their 16 per cent., a fairly high commission in itself. It seems apparent that Spicer Graham & Company and the defendant MacPherson made

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a secret arrangement and agreement between themselves, by which the defendant MacPherson was to appear to be the actual purchaser as between the principals and himself, and other purchasers were to be obtained at sufficiently higher prices to enable the defendant MacPherson to secure another high rate of commission, namely, 20 per cent., less the 2 per cent. and expenses already referred to, and at the same time Spicer and Graham be enabled out of the said additional price also to obtain a further commission than the 16 per cent. stipulated for between them and their principals.

The arrangement between Spicer Graham & Company and the defendant MacPherson was that the latter should, as between them and the defendant company, appear to purchase the lots and be recognised as the purchaser by the defendant company; and, having regard to the document signed by him, the defendant MacPherson cannot be heard to say that he did not buy and become the purchaser of the lots. It was part of the agreement between him and Spicer Graham & Company, however, and in this it was intended to deceive the defendant company, that purchasers were to be obtained who should be led to think they were dealing directly with the defendant company. As a matter of fact, the form of the agreement received by them represented Spicer Graham & Company as the vendors, and did not refer to the defendant company, except to the extent of its stamp-impressed name, as already indicated.

Upon the evidence, I think it is clear that MacPherson was a party to representations being made to the plaintiffs that they were dealing with the defendant company as vendor and owner, at the prices named in their respective agreements, when he knew as a matter of fact that he and Spicer Graham & Company had arranged that he should purchase the lots and was to be treated as having purchased them at the prices mentioned in his application to purchase, and that payments to the defendant company were to be made by or through him, or in his name by Spicer Graham & Company, to the defendant company. I think in this respect misrepresentation and deception were practised upon the plaintiffs. I think it is clear, too, that representations were made to the plaintiffs that the lots were worth more than they were paying for them, and would rapidly increase in price owing to the thriving character of the town of Canora.

I cannot think that such representations were justified by the facts; and I think that, so far as the defendant MacPherson is concerned, he was a party to their being made, and either knew they were untrue or was reckless as to whether they were or not.

In the circumstances, I think the plaintiffs are entitled to have the contracts rescinded, and as against the defendant MacPherson to recover the amounts paid by them under their contracts respectively, as damages resulting from such misrepresentations.

Judgment will therefore go in favour of the plaintiffs as against the defendant MacPherson for payment of the said sums, without interest, and with costs of suit.

The defendant MacPherson appealed from the judgment of SUTHERLAND, J.

January 25, 1918. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

R. T. Harding, for the appellant. The plaintiffs cannot claim damages in an action founded on deceit, where, as here, the contract has been rescinded, nor can they take judgment against one tort-feasor without releasing the other. An action to set aside a contract for misrepresentation stands on the same basis as an action for deceit; and, in order to succeed in it, the plaintiff must prove that the representations were false, to the knowledge of the defendant: *Derry v. Peek* (1889), 14 App. Cas. 337, *per* Lord Herschell, at p. 359 *et seq.* [On the question of release of one party by obtaining judgment against the other, HODGINS, J.A., referred to the judgment of A. T. Lawrence, J., in *Goldrei Foucar and Son v. Sinclair* (1917), 33 Times L.R. 318, affirmed 34 Times L.R. 74.] The plaintiffs' evidence does not establish the findings of the learned trial Judge, for the defendant MacPherson cannot be held liable for the frauds of Reid in Winnipeg, or of Spicer Graham & Company in Toronto.

R. S. Robertson, for the respondents, the plaintiffs, said that, as the defendant company did not appear, judgment went against them by default, but no formal judgment had been taken out. The applications signed by MacPherson were fraudulent, and it was his conduct that permitted the carrying out of the fraud through which the plaintiffs lost their money without obtaining

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any title to the lands. Moreover, the statements made by him as to the value of the lands were not ordinary puffing statements, but were absolutely reckless and unfounded, to his knowledge. Furthermore, the land company were falsely represented as being the owners of the property, whereas they were only agents for sale.

Harding, in reply, argued that the whole difficulty arose from the dishonesty of Reid, with which the appellant had nothing whatever to do.

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April 2. The judgment of the Court was read by FERGUSON, J.A.:—The plaintiff Dannecker in evidence asserts that the defendant MacPherson represented to him that Sweet “was representing the International Securities Company in selling these lots. . . . They (Sweet and MacPherson) had these lots to sell, and it was a good investment. Lots close to the centre of the town. . . . Good value . . . high and dry . . . in the centre of the town of Canora—it was a thriving town—going right ahead. He had been through that country, through the Canora district—price \$1,000; that it was a good buy; had a great future. It was worth the money we paid . . . as an investment . . . we were getting the money’s worth at the time”

“Q. They both said it was a good proposition? A. Yes, we were getting our money’s worth, good value for the money.”

The plaintiff Yost in evidence asserts that the defendant represented: “They were cheap lots—cheap buy—worth far more money than what he offered them at . . . Canora was a growing town, rapidly growing. They were central lots—in the centre of the town . . . three blocks from the post-office . . . ; the plaintiff bought three lots, price \$1,100.”

I am convinced that the defendant MacPherson made these statements, and a perusal of the evidence taken on commission convinces me further that these statements were untrue, and that no person with any knowledge of the actual facts and values could make such representations believing them to be true, either as statements of fact or as statements of an opinion; and that, unless the defendant MacPherson was himself misled by accepting Sweet’s statements, the representations were made without knowledge or justification. The defendant MacPherson does not

assert that he relied on Sweet, or that he made these statements honestly believing them to be true; he denies making some of them, and says he cannot remember making others; but he admits that Sweet, with whom he was sharing his 20 per cent. commission, made the others. Neither in his pleading nor his evidence does he attempt to justify his statements or Sweet's statements on the ground that they were true or that he believed them to be true.

As I read the evidence of location and value, these lots could not, by any stretch of imagination, be truthfully represented to be good value or worth the prices asked and paid, nor could they be truthfully described as "in the centre of the town of Canora," nor should Canora be represented as rapidly growing.

To my mind, the evidence on these points demonstrates that these lots as town-lots had very little, if any, value; and, by reason of the subdividing of the section, that the property as farm property was rendered useless and valueless.

For these reasons, I think that the defendant MacPherson, with the intention of inducing the plaintiffs to purchase these lots, and so that he might earn a commission of 20 per cent. of the purchase-price, took upon himself either to make statements he knew to be untrue or to assert his belief and knowledge in reference to matters on which he had no real belief or knowledge; in other words, these representations were made with a reckless disregard as to their truth or falsity, and without caring whether they were true or false, so long as they served the purpose of securing the plaintiffs' contracts to purchase. Viewed in the most favourable light to MacPherson, he took upon himself to warrant his own belief of that which he asserted and in reference to which he was entirely ignorant, and he should, I think, be held as responsible as if he had asserted that which he knew to be untrue: *Derry v. Peek*, 14 App. Cas. 337, and cases collected and considered in Halsbury's Laws of England, vol. 20, pp. 688 to 694.

It is argued that the judgment taken against the defendant company precludes the prosecution of this action against the defendant MacPherson. The judgment against the defendant company is copied at p. 30 of the transcript of the evidence, and it is urged that the recovery was upon the claim for deceit, and that the taking of judgment against one of two joint wrongdoers

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releases the other. For this proposition the defendant MacPherson relied on the cases collected at p. 384 of Holmested's Judicature Act. It is, however, to be noted that our Rules differ from the English Rules: Holmested, p. 864.

The point was considered in the Court of Appeal in the recent case of *Goldrei Foucar and Son v. Sinclair* (1917), 34 Times L.R. 74, [1918] 1 K.B. 180, and I think we can here, as was done there, treat the judgment against the defendant company as being entered upon a motion for judgment on the claim for return of moneys had and received, and not on the claim for damages for deceit.

I do not think that we must, and unless forced to I would not, construe the judgment against the company as being pronounced on the claim for damages for deceit. The statement of claim alleges and makes out a claim for the return of moneys had and received without consideration or on a total failure of consideration.

The defendant company did not appear to the writ or plead to the claim; and, as I read Rules 35, 220, 354 to 358 (Holmested, p. 862), it was quite open to the learned Chancellor to pronounce judgment in favour of the plaintiffs for a return of the moneys paid—instead of assessing the plaintiffs' damages for deceit. He directed judgment to be entered for a sum equal to the moneys paid and interest (see p. 14 and endorsements on the records), and also directed that the judgment should not prejudice the plaintiffs' right to proceed further against the defendant MacPherson. I am of the opinion that, had this judgment been pronounced in the absence of MacPherson, it could still be properly construed as a judgment entered on the cause of action for return of money received on a failure of consideration, so as to take it from under the principle stated in the cases now relied upon by the defendant MacPherson. But this judgment was pronounced in the presence of the defendant MacPherson, and he did not then appeal against that part which adjudged that "the entry of this judgment shall not prejudice the plaintiffs' right," etc., but allowed it to become a final and binding pronouncement on his rights—and, for this reason, I do not think he can now question the authority of that pronouncement.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

[MIDDLETON, J.]

1918

April 2.

COLE V. BRITISH-CANADIAN FUR AND TRADING CO.

Company—Winding-up—Action against Company Commenced before Winding-up Order—Liquidator Authorised to Continue Defence in Name of Company and Plaintiff to Continue Action against Company—Addition of Liquidator as Party Defendant—Personal Liability for Costs—Liability of Assets of Company.

An action brought in the Supreme Court of Ontario against an incorporated company, to set aside as fraudulent and preferential a chattel mortgage made to the company, was at issue when an order was made by a Quebec Court for the winding-up of the company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, and a liquidator was appointed. By orders made by the Quebec Court, the liquidator was allowed to intervene and continue the defence of the action, and the plaintiff was allowed to continue the action against the company in liquidation:—

Held, that the liquidator of the defendant company was not a necessary or proper party to the action; and an order made by a Master, upon the application of the plaintiff, adding the liquidator as a defendant was set aside.

When a company is in process of being wound up, the liquidator, if unsuccessful in litigation which he is carrying on, will pay the costs out of the assets of the company, and these costs have priority over the liquidator's costs of the winding-up. The estate of the company is in truth the party defendant, and is saddled with the burden of the costs awarded.

In re Pacific Coast Syndicate Limited, [1913] 2 Ch. 26, and *In re Wenborn & Co.*, [1905] 1 Ch. 413, followed.

When it is deemed proper that the right of the company should be determined in the pending litigation rather than in the liquidation, the liquidator may sue or defend either in his own name or in the name of the company; if he elects to proceed in his own name, he makes himself personally liable for costs; but no such liability should be imposed upon him, for he is an officer of the Court, and is only discharging his official duty.

MOTION by the liquidator of the defendant company, under Rule 303,* to set aside an order adding him as a party defendant in this action.

*The following Rules govern the procedure:—

300. If by reason of death (when the cause of action survives or continues) or by assignment or conveyance any estate, interest or title devolves or is transferred the action may be continued by or against the person to or upon whom such estate or title has come or devolved.

301. Where a change or transmission of interest or liability has taken place or where by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and the new party, may be obtained on præcipe.

302. Such order and a notice according to form No. 40, shall be served upon the continuing parties or their solicitors, and upon the new party.

303. A person served with such order may apply to the Court to discharge or vary the order at any time within 10 days from the service thereof.

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March 16. The motion was heard by MIDDLETON, J., in the Weekly Court, Ottawa.
M. G. Powell, for the applicant.
C. J. R. Bethune, for the plaintiff.

April 2. MIDDLETON, J.:—One Reid carried on business as D. M. Chambers & Co. On the 27th June, 1917, he made an assignment for the benefit of his creditors to Cole, the plaintiff.

On the 1st May, 1917, Reid had made a chattel mortgage to the defendant company for \$10,111.78; and this action has been brought for the purpose of having the chattel mortgage set aside as fraudulent and preferential. The action was at issue on the 12th December, 1917.

On the 28th December, 1917, a winding-up order was made, under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, placing the defendant company in liquidation; and Paul Turgeon has been appointed liquidator. This order was pronounced by the Superior Court of Quebec.

On the 2nd February, 1918, that Court made an order allowing the liquidator to intervene and continue the defence of this action; and on the 15th February, 1918, at the instance of the plaintiff, the same Court made an order allowing him to continue this action against the company in liquidation.

On the 6th March, 1918, the Local Master, *ex parte*, made an order adding the liquidator as a party defendant. I am not sure that this order was made in Chambers; it may have been on *præcipe*, under Rule 301.

The present motion attacks that order, not on any technical and narrow ground, but upon the ground that the liquidator is not a necessary or proper party to the action; and the motion is resisted on the ground that the liquidator is a necessary and proper party, and further that, as he is conducting the defence, he ought to be before the Court so that he may be answerable for costs, either personally or as representing the estate in liquidation.

I think the position taken by the liquidator is right. When the winding-up order is made, the company does not cease to exist. Its property remains vested in it. It ceases to remain under the management of its directors and under the control of its shareholders, and is placed under the control of the Court and the

liquidator, who is an officer of the Court for the purpose of liquidation. All actions by and against it are stayed as the effect of the liquidation; but, when it is deemed proper that the right of the company should be determined in the pending litigation rather than in the liquidation, the action is allowed to proceed. In such action the liquidator may sue or defend either in his own name or in the name of the company. Here the Court (i.e., the Court of Quebec, which has control of the liquidation) has authorised the liquidator to continue the defence of this action in the name of the company—that is, the Quebec Court has declared that, in its view, the rights of the contesting parties should be determined in the litigation pending in the Ontario Court.

There is no more right to add the liquidator as a party defendant in this action than there would have been to add the general manager or the board of directors before the winding-up. The decision in this litigation will bind the liquidator because he is the representative and executive officer of the company in liquidation.

Some fear was expressed that an award of costs against the company might be nugatory. This is groundless. When a company is in liquidation, and is in process of being wound up, the liquidator, if unsuccessful in litigation which he is carrying on, will pay the costs out of the assets of the company being wound up, and these costs have priority over the liquidator's costs of the winding-up: *In re Pacific Coast Syndicate Limited*, [1913] 2 Ch. 26; *In re Wenborn & Co.*, [1905] 1 Ch. 413.

In such cases the estate is in truth the party defendant, and the estate as such is saddled with the burden of the costs awarded.

Where for any reason the liquidator sues or defends in person, he makes himself personally liable for costs; but no such personal liability should be imposed upon him, for he is an officer of the Court, and is only discharging his official duty.

For these reasons, the order should be set aside, with costs to be paid by the plaintiff in any event of the action.

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[MIDDLETON, J.]

April 2.

RE NEWCOMBE.

Will—Construction—Bequest of Annuity Charged on Land—Specific Pecuniary Legacies—Out of what Property Payable—Whether Charged on Land—Specific and Residuary Legacies—Description of Property as “in England” and “in Canada.”

The estate of the testator, who died in England, consisted of two small sums of money in England, a considerable sum in a bank in Ontario, and valuable real estate in Ontario. By his will he appointed an executor, and gave him \$1,000. He gave his cousin in England (who predeceased him) an annuity of \$600, to be provided from the rents of the real estate in Ontario—“my nephews to whom . . . I bequeath that property contributing *this charge* in such proportion as they shall mutually agree or . . . as my executor shall deem just.” He then gave to the same cousin all his property in England. Then followed a legacy of \$5,000 to his niece; and then—“Subject to the above-mentioned *charges*, I give . . . to my nephews . . . my real property” in Ontario. There were two nephews; to one three-fifths of the property was given and to the other two-fifths. Lastly, he directed that “all other property than the above-mentioned which I possess in Canada” should be divided equally between three named persons:—

Held, that, though the annuity was made a charge upon the real estate, the legacies of \$1,000 and \$5,000, notwithstanding the use of the plural in the words “subject to the above-mentioned *charges*,” were not so made a charge.

The bequest of the property in England was a specific legacy. The residuary bequests were not specific, and had not priority over the pecuniary legacies of \$1,000 and \$5,000.

A gift of “my property at A.” is specific. The words “in Canada” at the end of the residuary bequest were not added with the view of making the gift specific, but because all in England had already been given.

MOTION by the executor of the will of James Kivelle Newcombe, deceased, for an order determining a question as to the construction, meaning, and effect of the will.

March 27. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

J. H. Bone, for the executor.

G. C. Campbell, for the administrator of the estate of Catharine Heal Barrick, who died after the motion was launched, and for Dr. E. J. Barrick.

W. G. Thurston, K.C., for Jack Carr Newcombe and Arthur Newcombe.

R. H. Parmenter, for pecuniary legatees.

F. W. Harcourt, K.C., Official Guardian, for the infants.

April 2. MIDDLETON, J.:—The testator died on the 19th March, 1917, in England. His will, dated the 5th February, 1914, has been admitted to probate in England and in Ontario.

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The estate consisted of:—

(1) Cash in Imperial Bank, Toronto.....	\$17,807
(2) Cash in Lloyds Bank, England.....	320
(3) Money in England.....	243
(4) Plot in cemetery, Toronto.....	50
(5) Five stores in Church street, Toronto.....	50,000

\$68,420

By the will the testator appoints Henry Mason his executor, and gives him \$1,000 “as a memento of my friendship with him.”

He then gives his cousin Annie L. Nankiville (who predeceased him) an annuity of \$600, to be provided from the rents of the Church street buildings—“my nephews to whom (as shewn below) I bequeath that said property contributing this charge in such proportion as they shall mutually agree or failing their agreement as my executor shall deem just.” The testator then gives to the same lady all his property in England.

Then follows a legacy of \$5,000 to his niece Catharine Newcombe; and, “Subject to the above-mentioned charges I give and bequeath to my nephews Jack Carr Newcombe and Arthur Newcombe my real property in Church street,” two stores being given to J. C. Newcombe and three to Arthur Newcombe.

Lastly: “All other property than the above-mentioned which I possess in Canada” is to be divided equally between his sister (Catharine Heal Barrick), his brother’s widow (Bertha Newcombe), and Katie Mason (daughter of Alfred Mason), save that the burial-plot is given to Dr. E. J. Barrick, the husband of Catharine Heal Barrick.

On this will a question arises as to how the pecuniary legacies are to be paid. Three views are propounded:—

(1) That the legacies are charged upon the lands given to the nephews.

(2) That the legacies fail, as the English money is required to pay debts, and the last gift is specific.

(3) That the last gift is in its nature residuary, or is of what remains of the Canadian assets after payment of the legacies.

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I accept as the true principle that pointed out by Mr. Campbell in his forcible argument—that the Court must above all things seek to give effect to the intention of the testator as found in the will; and this is, I think, a typical instance of a case calling for search for “the true intention of the testator, without reference to some of the older and subtler distinctions which were allowed to prevail:” *In re Robson*, [1891] 2 Ch. 559, 565. At the same time another principle must not be lost sight of: “An *â priori* assumption of what the testator would naturally intend . . . cannot be allowed to weigh against the proper construction of the words which he has used:” *Coltsmann v. Coltsmann* (1868), L.R. 3 H.L. 121, 130.

Here the will must be viewed as a whole, and the testator’s intention was that every part of it should have effect. Whatever trouble there is in ascertaining his meaning has not arisen from any change in his circumstances, but from his mode of expression.

I must so construe the will as to find some way by which these pecuniary legacies can be paid. If I fail in this, I know that the testator’s intention is being defeated.

Are they charged upon the lands in Ontario? Clearly not in express terms. Mr. Campbell argues that the use of the words “charges,” not “charge,” in the gift—“subject to the above-mentioned charges”—has the effect of charging the legacies as well as the annuity on the lands. Had the will read “subject to the payment of the above-mentioned legacies” there would have been no trouble; and, if none of the sums given had been described as a charge, there would have been little trouble; but the annuity is made a charge and the legacies are not. Is the change to the plural enough? I do not think so. The testator not only knew how to create a charge and used appropriate words when he did so, but when he made the annuity a charge on the rents of the five stores he knew that it would not be fair that it should be so borne that the nephew who received two only should pay as much as the nephew who received three, so he directs this charge to be apportioned by agreement or failing agreement by his executor.

I cannot think that if he intended the legacies for \$6,000 to be charged he would not have made some due provision for apportionment.

The use of the plural may be accounted for in various ways. He may have regarded the annuity when apportioned as con-

stituting separate charges, Jack Carr Newcombe's stores being charged with his share and Arthur's with his share. I cannot find any intention that these stores should be the source of payment of these legacies.

The \$17,807 on deposit in the Imperial Bank is the only other available source. The small sums in England were, as shewn by Mr. Campbell's cases, specific legacies.

Is this \$17,807 also a specific legacy so that as a matter of law it has priority over the pecuniary legacies?

There is no other residuary gift; and, if this legacy, which is wide enough to cover any residue, for it is of "all other property than the above-mentioned," is to be regarded as specific, it is so because the testator has added the words "in Canada." The testator having only property in Canada and in England, and having already given the English property to the English cousin, the addition of these words had no effect unless Mr. Campbell is correct in stating that they raised the status of the legacy from being residuary merely to that of a specific legacy.

The conclusion to which I have come is, that a division of the residuary estate according to its location, and the giving of that in England to one and that in Canada to another, will not make that which would otherwise be residuary specific so as to defeat the pecuniary legacies. The gift here of the English assets is general, and covers all the assets in England, but I cannot see that this makes any difference.

The absence of any other residuary gift, the generality of the terms used, the failure of gifts which the testator must have intended to be effective if this fund is not available, the use of the word "other," all convince me that this gift is essentially residuary in its nature.

The words "in Canada" were not, I think, added with the view of making the gift specific, but simply because all in England had already been given.

It has been argued that a residuary gift must possess the element of "universality." Even if that is so, this gift would possess that element in fact, for the English gift is specific, and there was no other property save that in Canada; but it is established that this is not a requisite.

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Mason v. Ogden, [1903] A.C. 1, 5, shews that a residuary gift may have limitations. There may be a residuary gift of personal property or a residuary gift of real property or a residuary gift of freehold property. Each is a residuary gift in its nature, it is "so framed as to sweep in by its terms the whole of the property to which it applies."

So here, there can be a residuary gift of property in Canada which will sweep in all property to which it applies, and this limited type of residual gift has all the attributes of a residual gift; it will not defeat a pecuniary legacy.

In *In re Balls, Trewby v. Balls*, [1909] 1 Ch. 791, the statement of Swinfen Eady, J., is in point (p. 795): "When the testator bequeaths pecuniary legacies and also gives all the real and personal estate to which at his death he shall be entitled in one mass, he obviously means his residue." This was said in a case in which, like the present, it was sought to defeat pecuniary legacies.

A useful instance of the tendency of the Courts to construe a gift, which is not in terms residuary, as impressed "with the characteristics of a residuary clause," is found in *In re Woolley*, [1918] 1 Ch. 33.

In all this I am accepting the cases cited by Mr. Campbell* as establishing that a gift of "my property at A." is specific. There is no doubt that, unless there is more in the will, this would be so.

It also should be noted that the words here used, "other property than that above-mentioned," may be read as excluding from the bequest the \$6,000 given to the pecuniary legatees, but perhaps this is only another way of saying that this legacy is residuary.

The costs will come out of the estate.

*See the following cases: *Sayer v. Sayer* (1714), 2 Vern. 688; *Moore v. Moore* (1781), 1 Bro. C.C. 127; *Nisbett v. Murray* (1799), 5 Ves. 149; *Shepherd v. Beetham* (1877), 6 Ch. D. 597; *In re Hamilton*, [1892] W.N. 74; *Roffey v. Early* (1873), 42 L.J. Ch. 472; *Powell v. Riley* (1871), L.R. 12 Eq. 175; *In re Robson*, [1891] 2 Ch. 559; *In re Prater* (1888), 37 Ch. D. 481; *Guthrie v. Walrond* (1883), 22 Ch. D. 573.

[FALCONBRIDGE, C.J.K.B.]

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April 8.

McCALLUM v. COHOE.

Husband and Wife—Liability of Wife on Promissory Note and Agreement Signed for Benefit of Husband—Absence of Consideration and of Independent Advice—Duress—Threat—Agent of Person in whose Favour Note and Agreement Executed—Evidence—Findings of Trial Judge.

In an action against a man and his wife to recover a sum of \$500 and for other relief, it appeared that the wife had signed a promissory note and an agreement whereby she had undertaken to pay to the plaintiff, who was the employer of her husband, certain sums of money due by the husband to the plaintiff. The wife was not in any way connected with the business between her husband and the plaintiff:—

Held, upon the evidence, that the wife had no legal and independent advice when she signed the documents, and received no consideration therefor; that she was induced to sign by a threat that the plaintiff would cause her husband to be arrested if she did not do so.

The threat was made by the manager of a bank, who took the note to the defendant. The manager said to the wife that the plaintiff had told him (the manager) that he (the plaintiff) would have the husband arrested if he did not settle; the manager afterwards told the plaintiff what he had said; and the plaintiff never repudiated or disavowed the transaction:—

Held, that the manager was the agent of the plaintiff in the transaction; and the wife was relieved from liability.

Bank of Montreal v. Stuart, [1911] A.C. 120, followed.

ACTION against a man and his wife to recover a sum of \$500, and for a mandatory injunction directing the defendants to execute and deliver to the plaintiff a mortgage on all real estate owned by them or either of them.

The action was tried by FALCONBRIDGE, C.J.K.B., without a jury, at Woodstock.

A. H. Boddy, for the plaintiff.

R. N. Ball, for the defendants.

April 8. FALCONBRIDGE, C.J.K.B.:—The male defendant had been buying wheat for the plaintiff on a commission basis, being credited with two cents a bushel on his purchases. From time to time Cohoe drew upon the plaintiff for amounts supposed to represent what he had to pay for the wheat, and it was found after a time that he had considerably overdrawn beyond the value of the wheat purchased. It was agreed between these two that there should be an arbitration to determine the amount of Cohoe's indebtedness to the plaintiff. As a preliminary to the inquiry, both defendants signed a joint and several promissory note, pay-

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able on demand to the order of the plaintiff, for \$1,500. This was given, it is said, as an evidence of good faith that the arbitration should be proceeded with. The female defendant also signed a submission to arbitration, whereby it was recited that the plaintiff agreed, in case the arbitrators should find Cohoe and his wife or either of them to be indebted to the plaintiff in a greater amount than \$1,500, that he would accept the sum of \$1,500 in full satisfaction of the indebtedness. If the indebtedness should exceed \$500, the submission provided, the sum of \$500 should be payable forthwith after the delivery of the award of the arbitrators; and the defendants further agreed to give a mortgage on all real estate of the defendants or either of them for the balance of indebtedness.

The arbitrators made their award, finding that the male defendant was indebted to the plaintiff in a greater sum than \$1,500.

No money was paid, and no mortgage was given, and this action is for the \$500, and for a mandatory injunction directing the defendants to execute and deliver to the plaintiff a mortgage on all real estate owned by them or either of them.

The male defendant has no defence to the action, and judgment will go against him for \$500, with interest from the 3rd day of January, 1918, and costs according to the practice of the Court.

As to the wife, who was not in any way connected with the business between her husband and the plaintiff, I find that she had no legal and independent advice when she signed the note and the submission to arbitration; that there was no consideration given to her for signing either of the said papers; that she signed the note and the submission by reason of a threat that the plaintiff would cause her husband to be arrested if she did not do so.

As to the defence of duress, it is contended on behalf of the plaintiff that this is a case of a third party stating something without any authority; citing Anson on Contracts, 6th ed., p. 174—"and it must be inflicted or threatened by the other party to the contract, or else by one acting with his knowledge and for his advantage" (1 Rolle, Abr. 688).

It was Mr. McLachlin, the manager of the Royal Bank at Norwich, who went to the Cohoes with the note. She says that she was frightened into signing the note, and that McLachlin said the plaintiff had said that "if I did not sign it he would be arrested." McLachlin states that he said to her: "McCallum told me he would

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have Cohoe arrested if he did not settle." That was his (McLachlin's) impression of what the plaintiff did say. Both the plaintiff and McLachlin say that he (McLachlin) was not told to go and get the note; but McLachlin on cross-examination says that he told the plaintiff afterwards what he had told Mrs. Cohoe about his intention to arrest her husband. The plaintiff, after receiving this information, never repudiated or disavowed the transaction. I think that under these circumstances McLachlin was an agent so as to bring the case within the rule.

Moreover, the other facts which I have found in her favour are sufficient to establish the defence of the wife. I refer to *Bank of Montreal v. Stuart*, [1911] A.C. 120; *Euclid Avenue Trusts Co. v. Hobs* (1911), 23 O.L.R. 377, 24 O.L.R. 447; *Hutchinson v. Standard Bank of Canada* (1917), 39 O.L.R. 286, 36 D.L.R. 378; *Vanzant v. Coates* (1917), 40 O.L.R. 556, 39 D.L.R. 485.

The action is therefore dismissed as against her. She defended by the same solicitor and counsel as her husband, therefore there will be no costs for or against her.

[APPELLATE DIVISION.]

MARSHALL v. HOLLIDAY.

1918
April 11.

Division Courts—Right of Appeal—"Sum in Dispute"—Division Courts Act, R.S.O. 1914, ch. 63, secs. 106, 125.

In sec. 125 of the Division Courts Act, R.S.O. 1914, ch. 63, the words "sum in dispute" mean "sum in dispute in the action"—"the sum sought to be recovered" mentioned in sec. 106.

Therefore, where the plaintiff's claim in a Division Court action was for \$99.02, principal and interest due upon a promissory note, and the Judge gave judgment for the plaintiff for the amount claimed and an additional sum for interest, by way of damages, the whole amount being slightly more than \$100, it was held, that the "sum in dispute" did not exceed \$100 and an appeal did not lie under sec. 125.

An appeal by the defendant from the judgment of the First Division Court of the County of Norfolk.

The action was on a promissory note for \$94.31, payable on demand, made by the defendant and endorsed over to the plaintiff.

The particulars given in the summons were:—

Principal.....	\$94.31
Interest	4.71

\$99.02

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At the trial, the Judge added a further sum of \$1.17 as interest, by way of damages, and gave judgment for \$100.19 and costs.

April 11. The appeal came on for hearing before MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

T. J. Agar, for the plaintiff, respondent, raised the preliminary objection that an appeal did not lie.

J. E. Jones, for the defendant, appellant, *contra*.

Section 125 of the Division Courts Act, R.S.O. 1914, ch. 63, provides that, "subject to the provisions of section 107 an appeal shall lie to a Divisional Court from the decision of the Judge . . . (a) in an action . . . where the sum in dispute exceeds \$100, exclusive of costs; . . ."

Section 106 provides that the "clerk shall place all actions in which the sum sought to be recovered exceeds \$100 at the foot of the trial list, and the Judge shall, in such actions, unless an agreement not to appeal has been signed . . . take down the evidence in writing. . . ."

Section 107 provides that "an appeal shall not lie if, before the commencement of the trial, there is filed . . . an agreement in writing not to appeal. . . ."

The provision in the earlier Division Courts Act, R.S.O. 1897, ch. 60, with regard to appeals, contained in sec. 154 (1), was: "In case a party to a cause . . . wherein the sum in dispute upon the appeal exceeds \$100 exclusive of costs, is dissatisfied with the decision of the Judge . . . he may appeal to a Divisional Court . . ."

On the argument of the preliminary objection, these statutory provisions were referred to, and also sec. 154 of R.S.O. 1914, ch. 63; and the following cases: *Foster v. Emory* (1890), 14 P.R. 1; *Hunt v. Taplin* (1895), 24 S.C.R. 36; *Allan v. Pratt* (1888), 13 App. Cas. 780; *Petrie v. Machan* (1897), 28 O.R. 504, 642; *Lambert v. Clarke* (1904), 7 O.L.R. 130; *Rathbone v. Michael* (1910), 20 O.L.R. 503; *Re American Standard Jewelry Co. v. Gorth* (1913), 5 O.W.N. 600.

THE COURT allowed the objection, and quashed the appeal with costs.

It was remarked that, had the language of the former statute been retained, and an appeal been given when "the sum in dispute upon the appeal exceeds \$100," there might have been room for argument that the appeal should be held to lie: *Lambert v. Clarke*, 7 O.L.R. 130. But the Legislature had deliberately omitted the words "upon the appeal;" and the Court thought that in the section which now governs, 125, the words "sum in dispute" meant "sum in dispute in the action"—"the sum sought to be recovered" mentioned in sec. 106.

Section 106 assists in the interpretation of sec. 125. By the former section, a special class of actions is to be set apart in a separate list; in the ordinary case the evidence in such actions is to be taken down in writing—clearly for the purposes of an appeal.

Here the "sum sought to be recovered" was \$99.02; the defendant could have put an end to the action by paying that sum and costs; and the fact that the Judge gave an additional sum as interest, by way of damages, not at all necessarily following a verdict for the plaintiff, could have no effect.

Appeal quashed with costs

[LENNOX, J.]

McFADDEN v. McFADDEN.

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April 12.
April 29.

Husband and Wife—Alimony—Judgment—Allowance from Date of Commencement of Action—Arrears—Costs—Death of Plaintiff between Hearing and Judgment—Rule 304.

In an action for alimony the defendant did not appear or defend, and judgment for the plaintiff was pronounced, on motion therefor, allowing her alimony from the date of issue of the writ of summons, but not before that date, though it was contended that "six years' back alimony" should be allowed.

Robinson v. Robinson (1828), 2 Lee Eccl. R. 593 (appx.), and *Soules v. Soules* (1851), 3 Gr. 113, applied and followed.

The plaintiff was allowed full costs of suit.

The motion for judgment was heard on the 8th April; judgment was given on the 12th April. The plaintiff died on the 11th April; and the Judge, having been advised of her death, directed that the judgment should be entered as of the 8th April: see Rule 304.

MOTION by the plaintiff for judgment on the statement of claim, in default of defence, in an action for alimony.

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April 8. The motion was heard by LENNOX, J., at a sittings for the trial of actions in Sault Ste. Marie.
T. E. Williams, for the plaintiff.
The defendant did not appear.

April 12. LENNOX, J.:—The writ of summons is endorsed for alimony and interim alimony until the trial, at \$40 a month; and was personally served. The defendant did not appear to the writ. The plaintiff filed and personally served the defendant with a statement of claim, alleging marriage and desertion, the ability of the defendant and his neglect to support or provide for the plaintiff, and claiming alimony and interim alimony as claimed by the writ, and also "six years' back alimony." The defendant has not delivered a statement of defence, and the pleadings have been duly noted closed.

The case came before me as presiding Judge at the jury and non-jury sittings of this Court at Sault Ste. Marie on Monday the 8th April instant, on notice of motion for a judgment granting all the relief above set out. The notice of motion was served by posting in the office of the Registrar of this Court at Sault Ste. Marie.

The plaintiff and defendant were married on the 7th March, 1872. The defendant, without justification or cause, deserted and abandoned the plaintiff about 22 years ago, and since that time has not supported or provided for her, and has lived in adultery with one Annie Green. There is some but not sufficient evidence as to the defendant's means to enable me to determine what periodical payments the plaintiff is entitled to by way of alimony.

I am referred to *Robinson v. Robinson*, decided in the Arches Court in 1728, but reported in the appendix to (1754-8) 2 Lee Eccl. R. 593, as authority shewing that I can give judgment for at least one year's alimony preceding the date of the issue of the writ. This does not appear to me to be sound in principle. Necessity is the basis of alimony: *Coombs v. Coombs* (1866), L.R. 1 P. & D. 218. The Court makes provision for the wife's existence by directing alimony or interim alimony where she cannot maintain herself or bring her action to trial without it, but not usually where she has independent means: *Madan v. Madan and De*

Thoren (1867), 37 L.J. P. & M. 10, 17 L.T.R. 326; and, although there are not many authorities, they are pretty clear and uniform that the very furthest back the Court can go is to the date of the institution of proceedings. This is as far as *Robinson v. Robinson*, when examined, seems to go. It is true that £400 is spoken of as "arrears of alimony," but I read it as what we would understand now as interim alimony. The learned Dr. Bettesworth, at p. 594, says: "I therefore decreed £200 per annum to be paid quarterly for alimony, and decreed a monition to him to pay her £400 for two years' arrears of alimony, from the going out of the process to the time of sentence, she having received no alimony during the suit."

The most direct authority and one that should bind me is a pretty old one too, that is, *Soules v. Soules* (1851), 3 Gr. 113. It was held in that case by Spragge, V.-C., that alimony could run only from the date of the decree. There had been no application for interim alimony. The Vice-Chancellor reviews and adopts the decisions of the Ecclesiastical Courts in England, including *Cooke v. Cooke* (1812), 2 Phillim. 40; *Kempe v. Kempe* (1828), 1 Hagg. Eccl. 532; and *Rees v. Rees* (1821), 3 Phillim. 387. But adopting the principle of *Soules v. Soules*, without qualification, does not compel me to say that the plaintiff is not in this case entitled to alimony as from the date of the writ. The *Soules* case proceeded on the additional principle that on further directions the decree governed, and the reference proceeded on the basis of the decree. I am making the *decree* now and here, without conflict. *Robinson v. Robinson* can be applied.

I may interject that there is another obstacle in the way of claiming "six years' back alimony;" it is not claimed by the writ; and, although it is claimed in the statement of claim, there was no amendment of the writ to found a broadened claim, nor notice that amendment would be asked.

On the authority of *Soules v. Soules*, the plaintiff is entitled to full costs of suit. The plaintiff has no money, property, or means of living.

There will be judgment for the plaintiff against the defendant for alimony with costs of the action, including the motion just disposed of, to be taxed on a solicitor and client basis, forthwith after taxation, and for a reference to the Local Master at Sault

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Ste. Marie to take an account of the property, income, moneys, and earnings of the defendant, and to determine and fix the annual sum which should be paid by the defendant to the plaintiff by way of alimony during her lifetime or until further order, counting from the date of the issue of the writ, making the same payable monthly, quarterly, or half-yearly as may appear practicable and just according to the financial circumstances of the defendant, and payable in advance if the circumstances warrant it; and judgment for payment of the periodical sums so ascertained to be payable by the defendant to the plaintiff, and the costs of the reference, taxed upon the basis aforesaid.

The plaintiff died on the day before the reasons for judgment were given to the Registrar. The learned Judge, having been informed of the death, made a memorandum as follows:—

April 29. LENNOX, J.:—Having reference to the fact that, upon hearing the motion herein, I determined and announced the conclusions subsequently set out in my reasons for judgment, but reserved for consideration the question whether I could give alimony prior to the date of the writ—ultimately refused—and, having regard to the provisions of Rule 304 and the decisions collected in Holmsted's Ontario Judicature Act, pp. 770, 771, I direct that judgment be entered as of the 8th April, 1918 (the date of the argument).

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April 13.

CITY OF TORONTO V. TORONTO R.W.CO.

Street Railway—Agreement with City Corporation—Construction—55 Vict. ch. 99, sec. 25 (O.)—Claim of City Corporation to Recover Moneys Expended in Removing Snow and Ice from Railed Streets of City—Liability of Street Railway Company—Jurisdiction of Court—Exclusive Jurisdiction of Ontario Railway and Municipal Board—Ontario Railway and Municipal Board Act, secs. 21, 22—63 Vict. ch. 102, sec. 5 (O.)

Held, that the Court had jurisdiction to entertain an action to recover a sum which the city corporation, the plaintiff, alleged it was compelled to expend in removing snow and ice from certain streets of the city in consequence of a breach of contract and negligence on the part of the defendant company.

It was not a case in which the Ontario Railway and Municipal Board had exclusive jurisdiction, under sec. 22 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186. The corporation was not compelled to make an application to the Board, under sec. 21, for redress in respect of something that the company ought to have done and failed to do.

Section 5 of an Act "respecting certain matters pertaining to the City of Toronto," 63 Vict. ch. 102 (O.), is not repealed by the Ontario Railway and Municipal Board Act.

And *held*, upon consideration of the provisions of sec. 25 of the Act incorporating the Toronto Railway Company, 55 Vict. ch. 99 (O.), and of conditions 21 and 22 of the agreement of the 1st September, 1891, as construed by sec. 25, that the company had not carried out the obligations imposed upon it with regard to the removal of snow and ice; and that the corporation was entitled to recover the sum expended by it in doing what the company ought to have done, and also interest on that sum.

ACTION to recover \$14,391.47 which the plaintiff, the Corporation of the City of Toronto, alleged it was compelled to expend in removing snow and ice from certain streets of the city in consequence of a breach of contract and negligence on the part of the defendant company, and to recover interest on the sum named.

The action was tried by LENNOX, J., without a jury, at a Toronto sittings.

W. N. Tilley, K.C., and C. M. Colquhoun, for the plaintiff corporation.

D. L. McCarthy, K.C., for the defendant company.

April 13. LENNOX, J.:—The corporation mainly relies upon conditions 21 and 22 of an agreement of the 1st September, 1891, between G. W. Kiely and others and the Corporation of the City of Toronto, as interpreted and settled by sec. 25 of the Act incorporating the Toronto Railway Company, 55 Vict. ch. 99 (O.)

Section 25 is as follows:—

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"And whereas doubts have arisen as to the construction and effect of sections 21 and 22 of the said conditions, it is declared and enacted that the said company shall not deposit snow, ice or other material upon any street, square, highway, or other public place in the city of Toronto without having first obtained the permission of the City Engineer of the said city or the person acting as such."

The conditions referred to are:—

"21. The track allowances (as hereinafter specified) . . . shall be kept free from snow and ice at the expense of the purchaser (the company), so that the cars may be used continuously; . . .

"2. If the fall of snow is less than six inches at any one time, the purchaser must remove the same from the tracks and spaces hereinafter defined, and shall, if the City Engineer so directs, evenly spread the snow on the adjoining portions of the roadway; but should the quantity of snow or ice, etc., at any time exceed six inches in depth, the whole space occupied as track allowances (viz. . . .), shall, if the City Engineer so directs, be at once cleared of snow and ice and the said material removed and deposited at such point or points on or off the street as may be ordered by the City Engineer."

The company came to trial upon the defences that: (1) "The defendants have carried out all obligations imposed upon them with regard to the removal of snow and ice," and the alleged expenditure by the corporation, if made, was voluntary. (2) If the alleged expenditure was made, the money "was not expended *bonâ fide* and for the purposes in the statement of claim alleged, but was recklessly and wastefully expended for other purposes than the ostensible purpose of removing the obstruction of traffic as in the statement of claim alleged."

At the opening of the trial, the defendant company was allowed to amend by setting up the absence of jurisdiction of this Court and the exclusive jurisdiction of the Ontario Railway and Municipal Board, under the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, particularly sec. 22; and the plaintiff corporation was allowed to reply denying the exclusive jurisdiction of the Board, and alleging that this legislation, if it purports so to enact, is *ultra vires*. I also allowed the plaintiff corporation to amend the 3rd paragraph of the statement of claim, and I allow it to amend by setting up a claim for interest, if it desires it.

Whatever may be the merits of this contention, I have heard the evidence, and it is convenient and advisable that, in addition to expressing my opinion as to the question of jurisdiction, I should state my conclusions upon the evidence, and the law generally as to liability, so that the action may be finally disposed of, if this Court has jurisdiction to try it.

As to the question of jurisdiction, no useful purpose would be served by attempting an elaborate analysis of the powers conferred upon the Railway and Municipal Board. Section 22 of R.S.O. 1914, ch. 186, is very specific: the jurisdiction is exclusive "in all cases and in respect of all matters in which jurisdiction is conferred" on the Board. But, whilst I cannot think that it is not open to debate whether the remedy sought in this action is a case or matter relegated to the Board, a careful reading of sec. 21 does not satisfy me that the city corporation was compelled to make an "application" to the Board for redress in respect of something that the company *ought to have done* and failed to do; thereby occasioning loss to the corporation. It may be true, it probably is true, that the corporation could have applied to the Board—and, if it were seeking aid in respect of something to be ordered and done, the Board might be the most appropriate tribunal—and once seized of the matter its jurisdiction might be exclusive, subject to the exceptions and right of appeal provided for; but in this case, essentially a claim for compensation in respect of something that has happened, I am not prepared to say that the corporation was limited to the Board in seeking redress.

The Act "respecting certain matters pertaining to the City of Toronto," 63 Vict. ch. 102, sec. 5 (O.), passed in 1900, not referred to on the argument, is not expressly, nor I think impliedly, repealed by the Railway and Municipal Board Act. It relates exclusively to the parties to this action, and covers much of the ground usually assigned for adjudication by the Board. And, notwithstanding the general jurisdiction of the Board, if the company, by reason of a failure to clear its tracks of snow or ice, should be prevented from rendering the transportation service provided for by its agreement, the penalties provided for by an Act "respecting the Toronto Railway Company," 4 Edw. VII. ch. 93, sec. 3 (O.), are recoverable "in an action," as liquidated damages. Why not recover "in an action" the unliquidated dam-

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ages occasioned by the neglect of the company to assist in keeping the streets along which its railway extends, safe and convenient for general traffic, by removing snow and ice as it is obliged to do by the terms of the same agreement?

Aside from the question of jurisdiction, since the passing of the Act 55 Vict. ch. 99 sec. 25, the position is:—

That, by reason of condition 21, the company must at its own expense, at all times, keep its track allowances so far free from snow or ice that the cars can be run continuously; and, by reason of sec. 25, in doing this (except in the case of an antecedent permission, which was not obtained), the company must not deposit snow or ice upon any street, square, highway, or other public place in the city. This condition (21), explained and defined by sec. 25, refers to any snow or ice, deep or shallow, that is calculated to prevent the continuous running of the cars—it is for the purpose of securing a continuous and efficient street-car service, and is directed to this only.

(2) That, by reason of condition 22, “if the fall of snow is less than six inches at any *one* time,” the company must remove it from the whole space occupied by track allowance (8 ft. 3 in. in respect of each track); and, “should the quantity of snow or ice, etc., at *any time* exceed six inches in depth, the whole space occupied as track allowances . . . shall, if the City Engineer so directs, be at once cleared of snow and ice;” and, by reason of sec. 25, the company must not (except by antecedent permission) deposit it upon any street, square, highway, or other public place in the city. This condition (22), explained, modified, and defined by sec. 25, whilst overlapping condition 21, and indirectly securing continuous railway operation, has for its object the keeping of the railed streets of the city—from kerb to kerb—in repair and reasonably safe and convenient, at all times, for general traffic, and for all persons having occasion to use them, to the extent *at least* of the duty and obligation imposed upon municipalities by the Municipal Act.

(3) That the effect of sec. 25 is practically to eliminate the provision as to spreading upon the street.

(4) That the provisions of the original conditions overlap; they were not carefully drawn in the first place, and they are a little more inartistic with the added statutory interpretation, but the combined effect of the two conditions and sec. 25 is absolutely

to bind the company promptly to remove all snow or ice calculated to impede, obstruct, or endanger the user of the streets for the ordinary purposes for which they are intended as streets or highways, as well as to provide for the continuous and efficient operation of the cars; and, in the performance of this unqualified obligation, the company must seek out and obtain dumping grounds as it can.

Whether it was appreciated by the draftsman or not is another matter; but the difference in the wording of the first and second provisions of condition 22, "If the fall of snow . . . at any *one time*," in the one case, and, "should the *quantity* of snow or ice, etc., *at any time exceed six inches in depth*," in the other, appears to me to eliminate any question as to the character of the storm, or the duration or continuity of the snowfall; for it is *the accumulation*, in the latter case, whensoever or howsoever it gets there, that the company is to remove. The construction as to this is not, however, perhaps of practical importance; for the evidence as to the character, duration, and severity of the snowfalls referred to, and the congested, almost impassable, and dangerous condition in which the company allowed the streets in question to remain, to my mind clearly compelled the city corporation to take the action and incur the outlay it did. The condition of the highway is described by many witnesses, and is not denied. The work was of the same character as was then being performed by the corporation along the civic lines, and for the same purpose—to make the streets passable and reasonably safe for traffic.

The defendant company has not shewn that it did anything whatever, unless I accept the statements in its letters as evidence, and they go to shew not that the company's efforts were being effective, but that it was making some effort and employing such force as it could obtain. If damages had been occasioned to anybody using the streets referred to, by reason of their condition as to snow or ice—and amounting to negligence—both parties to this action would have been liable; and, if the city corporation alone was sued, the company would be liable over: *Toronto R.W. Co. v. City of Toronto* (1895), 24 S.C.R. 589—the *Langstaff* case.

The company called no witnesses.

I cannot of course pronounce upon the expenditure in detail, but the account appears to have been carefully kept. The amount

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of it, I judge, has not at any time been seriously disputed. I find nothing to suggest that the money claimed was "recklessly" or "wastefully" expended, or that it was not made "*bonâ fide* for the purposes alleged in the statement of claim."

I think the corporation is entitled to interest. The money was worth 5 per cent. to each of these parties.

There will be judgment for the corporation against the company for \$14,391.47, with interest from the date of the writ.

[An appeal by the defendant company from the judgment of LENNOX, J., was heard by a Divisional Court of the Appellate Division on the 16th and 17th September, 1918. Judgment was reserved.]

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[APPELLATE DIVISION.]

Aug. 23.

SIERICHS v. HUGHES.

1918

April 16.

Contract—Sale of Flour of one Kind—Terms—Delivery "as Required"—Weekly Deliveries—Construction of Written Agreement—Variation—Evidence—Statute of Frauds—Surrounding Circumstances—Right to Require Delivery—Time of Essence—Agreement to Postpone not in Writing—Loss of Right—Abandonment—Inference from Silence.

The plaintiff, a baker, sued for damages for breach of an agreement made with him by the defendant, a dealer in flour, for the sale of 1,560 bags of flour (all of one kind) at a price agreed upon. There was a memorandum in writing, dated the 14th October, 1915, signed by both parties, in which the number of bags and the price per bag were stated, and the terms of payment and delivery as follows: "Terms cash." "Delivery as required—30 bags week is to be taken out by November 1st, 1916." Up to the middle of October, 1916, the plaintiff had asked for and had received only 1,077 bags, leaving 483 undelivered. About the middle of October, the plaintiff requested the defendant to deliver the 483 bags. The defendant refused, taking the position that, the plaintiff not having from time to time asked for 30 bags a week, he, the defendant, had considered that the plaintiff had abandoned his right to the flour not asked for, and he, the defendant, had sold the bags which had not been asked for, and was not bound to make delivery to the plaintiff. The plaintiff's claim was based on the refusal to deliver the 483 bags:—

Held, that oral evidence was not, by reason of the Statute of Frauds, admissible to shew a variation of the written contract; but evidence of the circumstances surrounding the making of the contract, the position of the parties, and their subsequent conduct, might be looked at to ascertain the true intent and meaning of the words used in the contract.

Williams v. Moss' Empires Limited, [1915] 3 Q.B. 272, followed.

And *held*, that, upon the wording of the contract, read in the light of the surrounding circumstances, the time fixed for delivery was of the essence of the contract and of the essence of the plaintiff's right to require delivery; that, if there was an agreement to postpone, it was ineffective because not in writing; that the plaintiff had not established that he was ready and willing to accept and pay for the flour in the manner and at the time provided for in the contract; that it was not necessary for the defendant, in

default of the plaintiff's request, to tender 30 bags per week; and, therefore, the rights of the parties terminated as to each 30 bags on the expiration of the week in which they should have been delivered; or that, at any rate, the proper inference from the contract and the evidence as to the position and conduct of the parties and the surrounding circumstances was that their rights were mutually abandoned.

Doner v. Western Canada Flour Mills Co. Limited (1917), 41 O.L.R. 503, distinguished.

Judgment of KELLY, J., reversed.

Per HODGINS, J.A., and LATCHFORD, J.:—The systematic and regular request, week by week, for smaller lots than 30 bags, enabled an inference of abandonment to be drawn in regard to the difference. Such a conclusion would not inevitably follow from mere silence.

The relative rights of vendor and vendee where the delivery is to be "as required" considered, and *Jones v. Gibbons* (1853), 8 Ex. 920, referred to.

ACTION for damages for non-delivery of flour by the defendant, a flour-dealer, to the plaintiff, a baker.

The action was tried by KELLY, J., without a jury, at Belleville. *E. G. Porter*, K.C., and *W. B. Northrup*, K.C., for the plaintiff. *W. N. Tilley*, K.C., and *E. J. Butler*, for the defendant.

August 23, 1917. KELLY, J.:—The written contract was of the 14th October, 1915, for sale by the defendant to the plaintiff of "1,560 bags of Harvest Queen flour; delivery as required, 30 bags week to be taken out by November 1, 1916." The plaintiff was at the time carrying on a bakery business; the defendant was a flour-dealer.

Delivery was made from time to time until the 18th or 19th October, 1916, when there was a substantial amount not delivered. Had delivery been made of 30 bags per week for the time of the contract, the whole amount would then have been delivered. The plaintiff then demanded delivery of the undelivered part of the amount contracted for, and this was refused, the defendant saying that he could not deliver; that he had not the flour.

It is admitted that 1,077 bags have been delivered.

The only evidence as to what happened in relation to making deliveries is to the effect that the plaintiff would state what he wanted from time to time, and that amount would be delivered.

In September, 1916, the plaintiff, who was then contemplating giving up business, discussed the suggestion with the defendant. The latter did not then, as he did not at any other time until his refusal to deliver in October, raise any question of the plaintiff's

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right to delivery of the whole undelivered portion of the amount contracted for; on the other hand, he rather intimated that the contract was not cut down in amount when he mentioned to the plaintiff, in this interview, that in a possible sale by the plaintiff of his business the contract which he held would be an inducement to a purchaser. If we analyse that conversation as detailed by the plaintiff and his daughter—and the defendant would not contradict them—the reasonable deduction is, taken with the fact that the defendant until after that time made no suggestion of repudiation of the plaintiff's right to delivery of the full amount of 1,560 bags, that the defendant at that time considered and believed that the plaintiff's right to call for delivery of the full amount was not cut down by his having in any week or weeks required delivery of less than 30 bags. I believe that what happened was nothing more than a request for postponement of the time for delivery of the undelivered portion of the 30 bags which in any week the plaintiff did not then ask for, and an acquiescence by the defendant in that mode of delivery. That being so, it might have been, and I think was, the privilege of the defendant, from the time the plaintiff demanded the whole undelivered balance, to have required the plaintiff to take deliveries, if not in amounts of 30 bags per week, in any event in reasonable weekly quantities; but he absolutely refused to make any further deliveries, and therein he committed a breach of the contract.

The defendant has laid stress on the fact that the plaintiff was a baker, and argues that he made the contract with the view of obtaining such a quantity of flour in each week as would supply the needs of his business; and that, having discontinued his business in the end of October, 1916, he had no further need of the flour. That theory cannot be accepted, unless the contract must be so considered, and I do not think that is its meaning; and I am confident from what happened that, while the defendant knew the business the plaintiff was engaged in, neither party had in mind that only such flour as the plaintiff would so use up to the 1st November, 1916, was covered by the contract, or that the discontinuance by the plaintiff of the baking business would be a termination of the contract, or that delivery of less than 30 bags in any week discharged the vendor from the obligation to make, later on, delivery of the undelivered portion for that week. His attitude

towards the situation when the plaintiff spoke of selling out his business in September, 1916, shews, as I have said, that at that late date he recognised the contract as one of value to the plaintiff in any agreement he might make for the sale of his business.

The rapidly increasing price of flour brought about a condition unfavourable to the defendant; and this, I think, is accountable for the change in his attitude, and his reluctance and refusal further to perform the contract.

Tyers v. Rosedale and Ferryhill Iron Co. Limited (1875), L.R. 10 Ex. 195, to which I have referred in my reasons for judgment in *Gerow v. Hughes*, *post*, tried immediately before the trial of the present case, is in point, both as to the obligation of the vendor to make delivery and as to the mode in which he was so obligated, as well as to the consequence of his refusal to make further delivery.

That being so, the plaintiff is entitled to succeed. The question of the amount of damages is to be determined on the value of the flour at the time of the breach of the contract. Evidence of the price at which the same grade of flour could be obtained at the time was submitted; the evidence of Mr. Pyne, the representative of the company which manufactured it, going to shew that this flour, delivered in jute bags to bakers, had advanced about \$2.15 per bag over the contract price. Calculated on that basis, the plaintiff's damages are reasonably placed at \$1,038.45, for which amount and costs he is entitled to judgment.

The defendant appealed from the judgment of KELLY, J.

January 8. The appeal was heard by MACLAREN and HODGINS, JJ.A., LATCHFORD and SUTHERLAND, JJ., and FERGUSON, J.A.

W. N. Tilley, K.C., for the appellant, argued that the case at bar was governed by the decision in *Doner v. Western Canada Flour Mills Co. Limited* (1917), 41 O.L.R. 503, and that the plaintiff was not entitled to have delivery otherwise than in weekly instalments, as provided by the contract. There is no written agreement to support the suggestion that a request was made by the plaintiff, and acceded to by the defendant, that there should be a postponement of the weekly deliveries stipulated for in the contract. Reference was made to *Tyers v. Rosedale and Ferryhill Iron Co. Limited*, L.R. 10 Ex. 195; Benjamin on Sale, 5th ed., p. 690, and cases there cited, especially *Plevins v. Downing* (1876), 1 C.P.D. 220.

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W. B. Northrup, K.C., for the plaintiff, the respondent, argued that the contract had been rightly interpreted by the learned trial Judge, and that his judgment was not affected by the decision in the *Doner* case, which is distinguishable. The evidence shews that it was not in the contemplation of the parties that the defendant should be discharged from his obligation to deliver the entire number of bags by reason of the plaintiff's acquiescence in the delivery of less than 30 bags per week from time to time.

April 16. FERGUSON, J.A.:—This is an appeal by the defendant from a judgment dated the 24th August, 1917, directed to be entered by Kelly, J., after the trial of the action before him, without a jury, at Belleville. The plaintiff's claim in the action is for damages for breach of contract arising out of a written agreement between the parties for the purchase and sale of flour. On the argument of the appeal it was stated that, if the plaintiff was entitled to succeed, the damages had been satisfactorily assessed.

The plaintiff is a baker, and the defendant a flour and feed merchant, both carrying on business at Belleville, Ontario.

The written contract referred to in the statement of claim, reads:—

"Bought of L.P. Hughes, Dealer in Flour and Feed etc.
"Terms Cash.

"Belleville, October 14, 1915.

"Mr. J. F. Sierichs,

"1,560 bags H. Queen \$2.45.

"Delivery as required—30 bags week is to be
taken out by November 1st, 1916.

"L. P. Hughes.

"J. F. Sierichs."

Under the contract the plaintiff was originally entitled to ask for and receive 1,560 bags, but as a matter of fact he only asked for and received for use in his business 1,077, leaving a balance undelivered of 483; and, in respect of the non-delivery of the 483 bags, the trial Judge assessed the plaintiff's damages at the sum of \$1,038.45.

About the middle of October, 1916, the plaintiff, realising, no doubt, that flour had advanced considerably above the contract price, requested the defendant to make delivery of this balance.

The plaintiff's account of the request and the resulting conversation is to be found in the evidence (p. 3). In this conversation the defendant took the position that, the plaintiff not having from time to time asked for 30 bags a week, he, the defendant, had considered the plaintiff as abandoning his right to the flour not asked for, and had from time to time sold the bags which had not been so asked for, and that he was not then in a position to deliver the unclaimed bags, and was not bound to do so. The plaintiff did not, in his pleadings, seek to vary the contract; and, if he had, I am of the opinion that, as the contract is one required under the Statute of Frauds to be in writing, he could not in law establish such a variation except by a written memorandum complying with the requirements of that statute.

This, I think, also applies to any variation set up by the defendant: *Plevins v. Downing*, 1 C.P.D. 220, 225, in which it is pointed out that in the case of *Tyers v. Rosedale and Ferryhill Iron Co. Limited*, L.R. 10 Ex. 195, relied upon by the trial Judge, the contract under consideration was in writing. See also Benjamin on Sale, 5th ed., p. 691.

The parties are, therefore, left to their rights under the written contract, and we must look carefully at that contract and study its provisions to ascertain the intention of the parties and the true meaning of the document, and thus arrive at a conclusion as to whether or not the time fixed for delivery, the manner of delivery, and the time of payment were of the essence of the contract.

"The question whether in a contract of sale time for delivery of the goods, or payment of the price, or performance of any other term, is of the essence of the contract . . . is, like all such questions, one of the intention of the parties:" Addison on Contracts, 10th ed., p. 503.

The circumstances surrounding the making of the contract and the position of the parties, and their subsequent course of conduct, may, I think, be looked at, not to add to or vary the terms of the document, but to arrive at a conclusion as to the true intent and meaning of the words used in the document.

"The Court it is which, when once it is in possession of the circumstances surrounding the contract . . . has to place the construction upon the contract:" Lord Cairns in *Bowes v. Shand* (1877), 2 App. Cas. 455, 462.

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It is established in evidence that the plaintiff is a baker, and that he, in entering into the contract, was entering into it for the purpose of enabling him to carry on his bakery business; that the defendant is a jobber in flour, who, after obtaining orders from his customers, contracted with a milling company for a supply of flour to cover his contracts and supply his customers in their business; and that it was his practice, on a customer not requiring the whole of any instalment, immediately to sell the surplus. It is clear that neither party was speculating in flour.

The plaintiff at p. 8 of the evidence says:—

“Q. Did you tell Mr. Hughes, when he made this contract with you, that you might want to go out of business? A. I told him that I might not be able to stay in business; I said people were baking bread.

“Q. A lot of your customers were baking bread, baking their own bread? A. Baking their own bread.

“Q. I see the contract says, ‘30 bags a week’—did you tell him you might not want that much? A. I told him I might not want that much.

“Q. Was any arrangement made with you about that? A. He said I could use whatever I required.

“Q. If you did not require the whole of it, you need not use it? A. No.

“Q. Then did you give an order from week to week as you wanted it? A. Yes.

“Q. And did you always get what you wanted in that way? A. Yes.

“Q. To the end? A. Not quite to the end.

“Q. And you had 50 bags left over when you went out of business? A. I went out of business on the 21st of October.

“Q. And at the time you went out of business, you still had 50 bags left? A. I had 50 bags.”

The defendant Hughes, in his cross-examination by Mr. Northrup, at p. 22, says:—

“Q. You received a letter from my firm dated the 23rd of October? A. Yes.

“Q. The letter reads, ‘Mr. J. F. Sierichs has instructed us to write you’ (reads letter). Did you receive that letter? A. Yes.

“Q. Did you do anything in consequence? A. I answered it I guess.

"Q. Did you do anything? A. I delivered his flour, the weekly allowance, just the same right on up to the end of his time.

"Q. The weekly? A. His weekly requirements, all he asked for.

"Q. And no more than that? A. No more.

"Q. And at the end of the time you did nothing towards delivering the balance? A. No, sir.

"Q. Between 1,077 and 1,560? A. No.

"Q. And you contend you were not liable? A. That is right. . . .

"Q. And you remember telling me to make it as short as possible, that the flour that was not taken by Sierichs was sold by you to——"

This unanswered question is followed up by the trial Judge, at p. 28 of the evidence, Hughes, the defendant, being still the witness:—

"His Lordship: Let me ask you this. Supposing there was a week the plaintiff only took 15 bags of flour, then what would you do with reference to the remaining part of what he was entitled to take that week? A. I went right on the market and sold it.

"His Lordship: And sold it to some one else? A. Yes.

"Q. Was that on the assumption that, that week having gone by, he had exhausted his privilege of buying for that week? A. Yes.

"Mr. Tilley: You thought, having regard to the condition of the market, you should have to keep cleaned up? A. Yes.

"His Lordship: You regarded what they did not take any week, they were not entitled to?

"Mr. Tilley: That is the whole question, my Lord.

"His Lordship: He regarded it as not under their contract."

The plaintiff does not seek damages on the basis that the defendant made default in delivery of the plaintiff's weekly requirements, but damages because the defendant refused, at the end of the contract period, to deliver bags which the plaintiff had neglected from week to week, during the term of the contract, to request delivery of in instalments. If the plaintiff had the right to request delivery, otherwise than in instalments of 30 bags per week, it seems to me his right must depend: (1) on the terms of

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the contract; or (2) on a request of the defendant to the plaintiff to forbear his right to demand such delivery, and his forbearance without an enforceable contract: *Ogle v. Vane* (1868), L.R. 3 Q.B. 272; *Hickman v. Haynes* (1875), L.R. 10 C.P. 598, 606; or (3) on a substituted contract, proved by writing within the Statute of Frauds: *Plevins v. Downing* (*supra*). These cases are considered and discussed in Benjamin on Sale, 5th ed., pp. 688 to 691. See also *Williams v. Moss' Empires Limited*, [1915] 3 Q.B. 242.

On the first question, the plaintiff contends that the contract should be read to mean that the defendant was bound to deliver or tender to the plaintiff 30 bags a week, even if the plaintiff did not in any one week specify any amount, or a less amount, and that the time of demand, delivery, and payment were not of the essence of the contract. The defendant's position, as I understand it, is that time and manner of request, delivery, and payment were of the essence; that he was not bound to deliver the whole 1,560 bags if the plaintiff failed to request such delivery in weekly instalments, not exceeding 30 bags per week; that, unless and until the plaintiff did so specify his weekly requirements and manner of delivery, the contract did not require the defendant to make a delivery or tender; that, in so far as the plaintiff failed from week to week to request delivery or specify the time and manner of delivery of an instalment, he failed to prove the allegation in his statement of claim "that he was ready and willing to accept and pay for the flour according to the terms of the agreement;" and that, in so far as he failed to require such delivery, he must be taken to have abandoned or exhausted his rights in reference to the flour which he did not request or take in such weekly instalments.

The plaintiff urges, in answer to this proposition, that failure to specify the time and manner of the delivery or to require the full weekly delivery was not an abandonment of his right to purchase, but an abandonment only of his right to delivery in that manner, and that he still had the right to call for delivery at any time up to the 1st November, 1916.

In the recent case of *Doner v. Western Canada Flour Mills Co. Limited*, 41 O.L.R. 503, an action to recover damages on a similar contract and under similar circumstances, the authorities were reviewed and considered, and the Court came to the conclusion

that each delivery stipulated for should be treated like a delivery under a separate contract, to be paid for separately, and in respect of the non-delivery of which the parties should be assumed to have contemplated a payment in damages rather than a rescission of the whole contract, and that the buyers, upon whom was the obligation to order, lost their right to require delivery to be made of the instalments which they had not ordered in due time. I am unable to distinguish this case from the case at bar: the flour was to be asked for and delivered in instalments, and paid for on delivery; it was material to the plaintiff to have flour for his business, and that it should be delivered at such times and from time to time as his business required it, and also delivered in such manner and in such lots as he could conveniently receive and pay for; it was material to the defendant in the carrying on of his jobbing business to contract ahead for the requirements of his customers, and from time to time to know what flour he might be called upon to deliver. I am of opinion that such was, at the time of the making of the contract, the true intent and purpose of the parties, and that it was never in the contemplation of the parties that the defendant should be required to keep on hand flour to answer a demand from the plaintiff for more than 30 bags in any one week, or that he should carry the surplus over the plaintiff's specified requirements for months, and at the end of the contract the plaintiff should be in a position to demand that the defendant deliver such accumulations, or that the defendant could, at the end of the time, if it suited his convenience, and the market, demand that the plaintiff should then accept and pay for such accumulations.

I am, therefore, of the opinion that, on the wording of the contract itself, read in the light of these circumstances, neither party was entitled to make or have delivery otherwise than in weekly instalments, not exceeding 30 bags a week, and that the terms providing for the time and manner of delivery and request for delivery and payment were of the essence of the contract, so far as the contract affects the sale and purchase of the flour covered by each instalment.

See *Coddington v. Paleologo* (1867), L.R. 2 Ex. 193, 198, where Pigott, B., says:—

“Between these conflicting views we have to decide, and to say

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what is the true meaning to be attached to the language of the contracting parties as understood by both of them. There is a canon for construing a contract laid down by Parke, B., which I think applicable to the present case. He says: 'It ought to receive that construction which its language will admit and which will best effectuate the intention of the parties to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they have used in the expression of their intent:' *Ford v. Beech* (1848), 11 Q.B. 852, at p. 866."

See also *Bowes v. Shand*, 2 App. Cas. at pp. 462, 463.

If I be right in my conclusion that the time fixed for delivery was of the essence of the contract, it was also of the essence of the plaintiff's right to require delivery; and if, on the interpretation of the contract, it was necessary for the plaintiff to make request for delivery by specifying his requirements before the defendant was called upon to make delivery or tender — and I think such to be the real meaning of the writing—then the plaintiff lost his right to delivery unless he proved a request within the time, or a waiver of the stipulation as to time; but, as it is conceded that he did not, from time to time, make such demands, it seems to me that on that view of the case he has failed to prove an allegation essential to his cause of action.

Were the defendant seeking damages for non-acceptance, proof of a readiness and willingness to deliver in the time specified would, it seems to me, be a necessary part of his case, and it would not do for him to prove a readiness or willingness to deliver after the time specified in the contract: Halsbury's Laws of England, vol. 25, para. 377; *Doner v. Western Canada Flour Mills Co. Limited*, 41 O.L.R. at p. 520.

For these reasons, I consider that, on the lapse of time fixed for each delivery, there was a mutual termination of rights in reference to that delivery, and of so much of the flour as might have been asked for or delivered in that instalment; and it matters not whether this loss be called a termination, exhaustion, or lapse of the respective rights of the parties, or a mutual abandonment thereof, as it was termed in the *Doner* case (*supra*). The result is the same. I prefer to regard it as a termination contracted for in the agreement sued upon.

In the *Doner* case, and in *Gerow v. Hughes*, *post*, the contracts were for the purchase and sale of two different kinds of flour to be delivered in instalments, which circumstances alone made it plain that the plaintiff in each of these cases should of necessity from time to time specify his requirements, before the defendant could be called upon to deliver or tender delivery of the instalment.

In this case, the purchase is of only one kind of flour, and to that extent the circumstances differ in favour of the plaintiff Sierichs, but I do not think that the difference is, in light of the evidence as to the position of the parties and the conditions and representations under which and on which the contract was entered into, material. In the ordinary contract of sale, "the chief and immediate duty of the seller, in the absence of contrary stipulation, is to deliver the goods to the buyer as soon as the latter has complied with the conditions precedent, if any, incumbent on him:" Benjamin on Sale, 5th ed., p. 677; and, had it not been for the provisions in this contract requiring the plaintiff's specification of the time, manner, and quantities of the deliveries he desired, the plaintiff's case would have been made out by proof of non-delivery. It is this condition as to the notification of the plaintiff's requirements that, to my mind, relieves the defendant in this case, and also relieved the defendants in the *Doner* case, from proving delivery, or excusing non-delivery.

For these reasons, I am of the opinion that the plaintiff has failed to make out a right to succeed on the contract, without evidence of a subsequent request for a postponement or an agreement to postpone, and it is therefore necessary to consider the second question: Was there a request from the defendant to the plaintiff to forbear making his demand?

The learned trial Judge refers to a conversation between the parties in September, 1916, in which they were discussing a proposed sale of the plaintiff's business, and he draws an inference from such conversation, not that the defendant requested a postponement, but that the plaintiff requested a postponement, and that the defendant acquiesced therein. If it were necessary to the decision of the case, I would not take that to be the effect of the conversation; but, as I read *Plevins v. Downing* (*supra*), such an agreement, in order to be effective, must be in writing. The conversation took place near the end of the contract-period, and

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after the rights of the parties in reference to instalments deliverable prior thereto had accrued, and such an agreement would necessarily be a variation of the contract materially affecting the defendant's right; and his assent thereto could not, I think, be proved by parol evidence, and it is conceded that there is no writing evidencing such an agreement.

On the whole, I am of the opinion that the plaintiff has not made out that he was ready and willing to accept and pay for the flour in the manner and at the time provided for in the contract, and that it was not necessary for the defendant, in default of the plaintiff's request, to make tender of the 30 bags per week; and that, therefore, the rights of the parties terminated as to each 30 bags on the expiration of the week in which they should have been delivered; or that, in any event, the proper inference from the contract and the evidence as to the position of the parties and the circumstances surrounding the making of the contract, and from conduct of the parties during the term of the contract, is, that their rights were mutually abandoned, and that the plaintiff, himself, was of that opinion; and that intent continued down to about the last month of the contract, when he saw an opportunity, by reason of the changed market conditions, of making a profit at the defendant's expense.

I would allow the appeal with costs, and dismiss the action with costs.

MACLAREN, J.A., and SUTHERLAND, J., agreed with FERGUSON, J.A.

HODGINS, J.A.:—I think the proper construction of the contract is that, while the respondent bought 1,560 bags of flour he was to take them by the 1st November, 1916, at the rate of about 30 bags a week, as his business might require. He did take 1,077 bags during the stipulated time, stating what he wanted and getting it from time to time. This left 483 undelivered, and not asked for until just before the end of the period mentioned. The verbal arrangement of October, 1916, under which the time would be extended for the delivery in weekly shipments, is unenforceable (*Williams v. Moss' Empires Limited*, [1915] 3 Q.B. 242).

I think the case differs from the *Doner* case, in that the system-

atic and regular request, week by week, for smaller lots than 30 bags, enables an inference of abandonment to be drawn in regard to the difference. Such an inference, I did not think, and so expressed myself in the *Doner* case, followed inevitably from mere silence. But, making that deduction from the entire course of dealing, the respondent fails. I should add that much of the evidence as to conversations before the contract and views of its effect afterwards was clearly inadmissible and should be disregarded.

I may perhaps draw attention to the case of *Jones v. Gibbons* (1853), 8 Ex. 920, as to the relative rights of vendor and vendee where the delivery is to be "as required." That case is treated as still an authority for the twofold proposition that, while the vendee, if he requires delivery, must ask for it within a reasonable time, yet the vendor cannot cancel the contract without himself offering to deliver or inquiring of the buyer whether he would take the goods.

I would allow the appeal and dismiss the action with costs.

LATCHFORD, J., agreed with HODGINS, J.A.

Appeal allowed.

[APPELLATE DIVISION.]

GEROW v. HUGHES.

Contract—Sale of Flour of two Kinds—Delivery "as Required"—Weekly Deliveries—Construction of Written Agreement—Variation—Forbearance—Silence—Rights to Require Delivery—Time of Essence—Specification of Requirements—Abandonment.

In the case of a contract for the sale of flour, similar to that in question in *Sierichs v. Hughes*, *ante*, it was *held*, that an action for damages for breach of the contract failed, for the reasons given in that case.

The contract in this case was for 1,000 bags of one kind of flour and 1,000 bags of another kind; and it was *a fortiori* plain that the obligation was on the plaintiff (the vendee) to specify his requirements before the defendant was called upon to make delivery.

The terms as to delivery in this contract were: "Delivered as required up to Nov. 1, 1916, 35 bags week;" and it was *held*, that this must be read to mean that the flour was to be delivered as required in instalments of about 35 bags per week.

There was in this case no attempt to prove any variation of the contract or request by the defendant to forbear, except in so far as that might be inferred from silence.

Doner v. Western Canada Flour Mills Co. Limited (1917), 41 O.L.R. 503, referred to.

Judgment of KELLY, J., reversed.

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ACTION for damages for non-delivery of flour by the defendant, a flour-dealer, to the plaintiff, a baker.

The action was tried without a jury by KELLY, J., at Belleville. *E. G. Porter*, K.C., and *W. B. Northrup*, K.C., for the plaintiff. *W. N. Tilley*, K.C., and *E. J. Butler*, for the defendant.

August 23, 1917. KELLY, J.:—The contract, made on the 14th October, 1915, was for 1,000 bags of Rose flour at \$2.70 and 1,000 bags of Queen flour at \$2.45, "delivery as required up to November 1, 1916;" and it contained a reference to 35 bags per week. If the contract means that delivery would be at the rate of 35 bags per week throughout the period from the date of the contract to the 1st November, 1916, the whole amount contracted for could not have been delivered by the latter date; for at that rate of delivery there would at the end of the term have remained undelivered in the neighbourhood of 100 bags, delivery of which could not be enforced unless the purchaser had the right then or later to demand delivery of the balance, which was considerably in excess of the maximum amount for any one week. It is important to bear this in mind in arriving at the true meaning of the contract.

But the contract, containing as it does an indefinite mention of 35 bags a week, is very definite in stating that the sale is of 2,000 bags, "delivered as required up to the 1st November, 1916." That result could only be arrived at by a delivery of more than 35 bags in some week or weeks, or by delivery at the end of the specified time or later of any undelivered balance of the quantity contracted for.

The effect of the defendant's contention would be, treating each week's delivery as a separate and distinct matter, that the vendor's obligation was to deliver in each week 35 bags or such lesser amount as the purchaser should specify, and that if in any week the purchaser should fail to specify the full amount of 35 bags, delivery of the part of 35 not specified for that week would be altogether waived. That, however, could only be on the assumption that the contract was not one entire contract, but separate and distinct deliveries, each independent of the others. That, I am of opinion, is not its meaning. It is, I think, one entire contract.

There is no evidence of any express request by the plaintiff to the defendant to delay or defer delivery of the part of the 35 bags of which he did not ask delivery in any week; but such request may well be implied from their manner of dealing. In no case in any week in which the plaintiff did not require delivery of the full amount of 35 bags—and it must not be overlooked that delivery was to be as required up to the 1st November, 1916—did the defendant raise the question that the plaintiff, in not asking for the full amount of 35 bags, was thereby waiving his right to receive the portion he did not in that week specify for delivery; but he continued delivery as the plaintiff required from time to time without protest, in effect postponing the time for delivery of any undelivered portion of the weekly amount.

The plaintiff, in my opinion, is in a much stronger position than were the purchasers in the case of *Tyers v. Rosedale and Ferryhill Iron Co. Limited* (1875), L.R. 10 Ex. 195. In that case the defendants had contracted in October, 1870, with the plaintiffs for the sale of 2,000 tons of iron, "delivery in monthly quantities (of 166 $\frac{2}{3}$ tons) over 1871, or sooner if required." In January, 1871, 101 tons were delivered, the plaintiffs not having demanded delivery of the balance of the monthly quantity. In February, and at several times between that date and December, 1871, the plaintiffs required the defendants to forbear from delivery of more iron under the contract, and the defendants accordingly only made partial deliveries during the several months of 1871 up to and including November. In December the plaintiffs required delivery of the undelivered balance of the 2,000 tons. The defendants refused and took the position that they were not liable to deliver any more iron under the contract, except what was due on the monthly balance. In an action for non-delivery the trial Judge ruled that the effect of the different postponements was not to put an end to the contract, but only to postpone the time for delivery, and consequently there was a breach of contract by the defendants. On appeal two members of the Court of Exchequer ((1873) L.R. 8 Ex. 305) agreed in the conclusion that the plaintiffs, having themselves requested the defendants to forbear from delivery during the several months of 1871 up to November, could not require delivery of the residue of the whole 2,000 tons in December. The other member of the Court (Martin, B.) took a different view. On

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further appeal (L.R. 10 Ex. 195) the Court unanimously disagreed with the majority of the lower Court and agreed with the judgment of Baron Martin. Baron Martin stated that the plaintiffs' position was that they requested the defendants as a favour and convenience to them not to press upon them the acceptance of the iron, inasmuch as it was inconvenient to them to receive it, and that there was nothing to shew that the plaintiffs ever intended that the entire quantity of 2,000 tons should not be delivered, or that the defendants understood that such was their intention. He said there was nothing in the correspondence to indicate that the plaintiffs ever proposed or intended or suggested that the entire quantity of 2,000 tons should not be delivered, or that the defendants ever put it forward as their understanding of it until the price of iron had risen in November, when it was their interest not to deliver.

In the present case the defendant says he sold to others in each month whatever part of the 35 bags the plaintiff did not in that month make request for, but it is nowhere said or even hinted that, if he took that course, it was communicated to the plaintiff, or that the plaintiff in any way became aware of it. If he had any intention of disputing the plaintiff's right to full delivery later on, it would have been the reasonable thing for him to have put the matter before the plaintiff.

In his judgment in appeal in the *Tyers* case, Cockburn, C.J., after expressing approval of the view taken by Martin, B., said that the defendants acquiesced, not in holding the contract at an end, but in postponing the period of delivery; that, the iron being deliverable in the course of the year 1871, and there being by reason of the postponement a very considerable arrear at the end of the year, and the plaintiffs having then called on the defendants to deliver at once the whole or what remained undelivered, that demand was one which the plaintiffs were not entitled to make; that, the postponement having had the effect of carrying the period of delivery over the year 1872, the defendants could not be called upon to deliver 1,000 tons of iron at one time, but only in such quantities as were originally provided for; that the defendants might therefore have said: "We shall not deliver the whole that remains in one mass, but we will deliver it according to the terms of the contract;" but, not having said this, and having said, "We

will not deliver you anything at all," they therefore committed a breach of the contract, for which they were liable in damages. This opinion was concurred in by the other members of the Court. Blackburn, J., with reference to the question whether when the postponement of delivery took place the effect was to make the balance of the iron deliverable during the year 1871 by monthly instalments, or whether the plaintiffs had a right to require that it should all be delivered in December, said that, had the defendants, when in December they in effect said, "We will deliver a certain quantity, and no more at any time," said, "We want a reasonable time and no more," he would have been willing to construe the agreement in that way; but they did not ask for time; they refused to deliver anything but the monthly quantity, which, he held, constituted a breach.

The facts of the present case are remarkably similar to those of the case just cited, even to the manner of refusal about the end of the term to deliver any part of the undelivered flour. The defendant's counsel has urged that here there was not an acquiescence in delay for delivery, such as appears in the other case; but I find that there was in fact such acquiescence; there was not, at any time until the 16th October, a refusal to deliver the reduced quantity which the plaintiff asked for, nor an insistence, or even an intimation, that the plaintiff would not, later on, be entitled to delivery of any undelivered portion of the 35 bags for any week, and not even a hint that the plaintiff's requisition for less than 35 bags in any week constituted a breach of the contract. Instead, he continued until October delivering (as required) on a contract by which he agreed to sell and deliver 2,000 bags, and, by his conduct at least, acquiesced in the plaintiff's accepting delivery of such quantity less than 35 bags as he required.

The question raised by the defendant's counsel of the plaintiff's right to specify a delivery of so much as he demanded in October, 1916, is answered by the opinion expressed in the reasons for judgment in *Tyers v. Rosedale and Ferryhill Iron Co. Limited*, to which I have just referred.

The conclusion I have arrived at is, that the plaintiff's contract called for delivery of 2,000 bags; that, notwithstanding that he had not asked for or received during the term the full amount of 35 bags per week, he was still entitled to delivery of the undelivered

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part of what was contracted for; that the defendant, having about or shortly before the end of October, 1916, refused to deliver anything beyond the amount specified for that month, he was guilty of a breach of the contract which entitled the plaintiff to his remedy in damages. The question whether these damages are to be arrived at as of the end of October, 1916, or whether on the other hand regard must be had to the later prices spread over the time within which the deliveries should reasonably have been made had the defendant not refused to make further deliveries, is one which need not now concern us, for on the evidence it is apparent that not only had the prices risen up to the end of October, but that the advance continued after that time.

The parties agree that the defendant delivered 440 bags of Five Roses and 727 bags of Queen. On the evidence of the prices at which this flour or flour of similar grade could be purchased at the beginning of November, 1916, the fair deduction is, that there was an advance of about \$2.15 per bag on each grade. The representative of the company which manufactures this flour says that, for delivery in jute bags to bakers, the price had advanced to that extent; other witnesses, speaking of other flour of similar grade, practically corroborate this.

I find that the plaintiff has sustained damages of \$1,790.95, for which amount, less \$53.15, unpaid account charged for in the statement of defence for flour delivered, and costs, there will be judgment in his favour.

The defendant appealed from the judgment of KELLY, J.

January 7 and 8. The appeal was heard by MACLAREN and HODGINS, JJ.A., LATCHFORD and SUTHERLAND, JJ., and FERGUSON, J.A.

W. N. Tilley, K.C., for the appellant, argued, as in the *Sierichs* case, *ante*, that the question at issue was practically concluded by the decision of this Court in *Doner v. Western Canada Flour Mills Co. Limited* (1917), 41 O.L.R. 503, from which the case at bar was not distinguishable.

R. McKay, K.C., for the plaintiff, the respondent, argued that the judgment of the learned trial Judge was right and should be affirmed. It was a case of an entire contract, and there was nothing to control or modify the operative words under which the

whole number of bags was to be delivered by the 1st November, 1916. The reference to weekly delivery was simply as to an estimated amount, and in no way affected the obligation of the defendant to deliver the full amount. The case at bar was not within the *Doner* case, in which the plaintiff's rights were subject to limitations which do not exist here. There is here no suggestion of the abandonment of the contract, the onus of shewing which lies on the defendant.

Tilley, in reply, referred to *Tyers v. Rosedale and Ferryhill Iron Co. Limited*, L.R. 8 Ex. 305, L.R. 10 Ex. 195.

April 16. FERGUSON, J.A.:—This is an appeal by the defendant from a judgment dated the 23rd August, 1917, directed to be entered by Kelly, J., after the trial of the action before him without a jury at Belleville, whereby he directed that the plaintiff should recover against the defendant the sum of \$1,737.80 as damages for breach of contract arising out of an agreement for the purchase and sale of flour.

This case was tried with the case of *Sierichs v. Hughes*, *ante*, and in appeal was argued with that case. The defendant in both cases is the same, and the facts and circumstances and the contract between the parties do not materially differ from the facts and circumstances and contract in the *Sierichs* case, except in that in this case the plaintiff agreed to purchase and the defendant agreed to sell two kinds of flour instead of one, from which it should be plain that the obligation was on the plaintiff to specify his requirements before the defendant was called upon to make delivery, and except that the document is on its face incomplete, thereby necessitating the taking of evidence in order to explain its meaning and to arrive at the true intention of the parties. The contract reads:—

“Bought of L. P. Hughes, Dealer in Flour and Feed etc.
“Terms Cash.

“Belleville, Oct. 14, 1915.

“Mr. J. L. Gerow,

“1,000 Bgs. Rose \$2.70

“1,000 “ Queen 2.45

“Delivered as required up to Nov. 1, 1916, 35 bgs. week.

“L. P. Hughes.

“J. L. Gerow.”

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The plaintiff's interpretation of the document is best set out in paragraph 2 of his reply, which reads:—

"2. And for a reply to the said statement of defence the plaintiff says that the contract alleged in the plaintiff's statement of claim was and is the only contract between the plaintiff and defendant, and that there was no new contract or variation of the original contract, as the defendant alleges; but the said flour, in and by the said contract, was all to be delivered by the 1st day of November, 1916, which the plaintiff estimated would be about 35 bags per week, but such weekly delivery was not in any manner to affect and did not affect the delivery of the full amount within the time aforesaid, to which the plaintiff was entitled, *and the plaintiff, in no way admitting the said new contract, or variation thereof, set forth in paragraph 3 of the defendant's statement of defence, sets up and pleads, as a further reply thereto, the Statute of Frauds, R.S.O. 1914, chapter 102, section 12.*"

I am of the opinion that the document must be read to mean that the flour was to be delivered as required *in instalments of about 35 bags per week*; that it was, under the contract, incumbent upon the plaintiff to specify his requirements and accept delivery in instalments of about 35 bags a week, so as to receive and accept, by such instalment demands, the whole 2,000 bags before the 1st November, 1916; that he failed to prove such specifications and requests, and thereby his readiness and willingness to accept and receive the said flour at the time and in the manner specified in the contract; that, as in the *Sierichs* case, the time and manner of specifying and requesting and accepting delivery were of the essence of the contract; that the plaintiff is not entitled, under the words of the contract itself, to ask or demand delivery at any other time or in any other manner; and that, he not having attempted to prove any variation of the contract or request by the defendant to forbear, except in so far as that may be inferred from silence (see *Doner v. Western Canada Flour Mills Co. Limited*, 41 O.L.R. 503), his action fails.

I would allow the appeal with costs, and dismiss the action with costs.

MACLAREN, J.A., and SUTHERLAND, J., agreed with FERGUSON, J.A.

HODGINS, J.A.:—I have given in the *Sierichs* case my view as to the interpretation of the contract in question there. It is identical in legal effect with that in this case.

I concur in allowing the appeal and dismissing the action, but adhere to my dissent on the points mentioned in the *Doner* and *Sierichs* cases.

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LATCHFORD, J., agreed with HODGINS, J.A.

Appeal allowed.

[APPELLATE DIVISION.]

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April 16.

JUDSON v. HAINES.

Negligence—Collision of Motor-vehicles in City Highway—Proof of Negligence—Onus—Evidence—Motor Vehicles Act, sec. 23—Judge's Charge—Findings of Jury—Form of Questions—Meaning of Answers—Questions Left Unanswered—Contributory Negligence—Ultimate Negligence—Proper Judgment on Findings.

The plaintiff sued to recover damages for injury and loss sustained by him by reason of a collision between his motor-cycle, upon which he was proceeding in an easterly direction upon a city street, and the defendant's motor-car, which he was driving in a southerly direction, upon an intersecting street. The defendant had the right of way. Each saw the other, but only a few moments before the collision. The plaintiff put on his brakes and reduced his speed, but kept straight on, and blew his horn. The defendant momentarily checked his speed; but, supposing that if he stopped he would come to a standstill directly in front of the plaintiff, went on, swerving to the east, thinking to give more room. The result was the collision. In answer to questions, the jury found: (1) that the defendant had not shewn that the occurrence was not caused by his negligence; (2) that the plaintiff contributed to the occurrence by his negligence; (3) that the plaintiff's negligence consisted in excessive speed; (4) that the plaintiff could, by the exercise of reasonable care, have avoided the accident; (5) by "driving slower;" (6) damages, \$3,500; (8) notwithstanding the negligence of the plaintiff, the defendant could, by the exercise of reasonable care, have avoided the accident; (9) by stopping his car. Questions (7), "If you find that the negligence of the defendant caused the accident, state fully in what the negligence consisted?" (10) "Notwithstanding the negligence of the defendant, could the plaintiff, by the exercise of ordinary care, have avoided the accident?" and (11) "If so, how?" were not answered. Upon these findings, the trial Judge, RIDDELL, J., pronounced judgment dismissing the action:—

Held (MAGEE and FERGUSON, J.J.A., dissenting), that the answers of the jury indicated that both parties were to blame for the collision, and the action was properly dismissed; there being nothing to suggest that the defendant was guilty of ultimate negligence.

Discussion of the Judge's charge and the question of the onus of proof, having regard to sec. 23 of the Motor Vehicles Act, R.S.O. 1914, ch. 207.

Per MAGEE and FERGUSON, J.J.A.:—The real meaning of the answers of the jury, taking into account their failure to answer questions 10 and 11, was left in doubt, and there should be a new trial.

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AN appeal by the plaintiff from the judgment of RIDDELL, J., upon the findings of a jury, in favour of the defendant, dismissing the action, which was brought to recover damages for injury and loss sustained by the plaintiff by reason of a collision of his motorcycle with the defendant's automobile, upon a highway, by reason of the defendant's negligence, as the plaintiff alleged. The findings of the jury were in the form of answers to questions (set out below). The jury assessed the plaintiff's damages at \$3,500.

January 10 and 11. The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., LATCHFORD, J., and FERGUSON, J.A.

J. P. MacGregor, for the appellant, argued that, upon the answers of the jury, the trial Judge should have entered a verdict for the plaintiff, as they were equivalent to a finding of ultimate negligence against the defendant. He also erred in not directing the jury upon the statutory duties imposed upon the defendant by the Motor Vehicles Act, and on this ground the plaintiff is entitled, at all events, to a new trial. The damages awarded are altogether inadequate, in view of the actual monetary loss to the plaintiff, in addition to which he has suffered serious permanent injury, and endured intense suffering for two years. There is evidence warranting the jury's finding that, notwithstanding the plaintiff's negligence, the defendant could, by the exercise of reasonable care and skill, have avoided the accident by stopping his car. This amounts to a finding that the defendant was responsible for the negligence causing the injury: *British Columbia Electric R.W. Co. v. Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4. The only testimony as to the alleged excessive speed of the plaintiff is that of the defendant, who said to the plaintiff's wife, after the accident, that it was his (the defendant's) car that "ran the plaintiff down." The case is brought within the rule *res ipsa loquitur*, as expounded in *Byrne v. Boadle* (1863), 2 H. & C. 722: see Halsbury's Laws of England, vol. 2, para. 753; on the application of that doctrine to the probabilities of a case. Reference was also made to *Maitland v. Mackenzie* (1913), 28 O.L.R. 506; *Ruddy v. London and South-Western R.W. Co.* (1892), 8 Times L.R. 658; *Butterly v. Drogheda Corporation*, [1907] 2 I.R. 134; *Davies v. Mann* (1842), 10 M. & W. 546; *Campbell v. Pugsley* (1912),

7 D.L.R. 177, and cases there cited, a decision mentioned with approval in *Bernstein v. Lynch* (1913), 28 O.L.R. 435, *per* Sutherland, J., at p. 440; *Rowan v. Toronto R.W. Co.* (1899), 29 S.C.R. 717; *Brown v. London Street Railway* (1901), 2 O.L.R. 53.

H. H. Dewart, K.C., and *G. W. Mason*, for the respondent, the defendant, argued that the weight of the evidence was in favour of the defendant, whose statement as to the rate of speed had been accepted by the jury. Each party saw the approach of the other, and the obstacles to clear vision were by no means so formidable as had been stated. The statutory onus has no application where, as in this case, the collision is between two motor-vehicles. The trial Judge thought that the onus was on the defendant, but nevertheless the jury found in his favour, as is shewn by their answer to the 3rd question. No case is made out for a new trial, as it is clear that the ultimate cause of the accident was the active and continuing negligence of the plaintiff. The *Brown* case is not in point here, as it turned on the question whether or not a new trial should be granted. They referred to the judgment of Lord Sumner in the *Loach* case, [1916] 1 A.C. at p. 725, 23 D.L.R. 4, at p. 8, where he cites with approval the judgment of Anglin, J., in *Brenner v. Toronto R.W. Co.* (1907), 13 O.L.R. 423. The defendant acted according to his best judgment in an emergency created by the plaintiff's act. On the question of the effect of the jury's findings, reference was made to *Reynolds v. Thomas Tilling Limited* (1903), 19 Times L.R. 539; *Jones v. Toronto and York Radial R.W. Co.* (1911), 25 O.L.R. 158.

MacGregor, in reply, referred to *Ontario Hughes-Owens Limited v. Ottawa Electric R.W. Co.* (1917), 40 O.L.R. 614, 39 D.L.R. 49, and to *Columbia Bitulithic Limited v. British Columbia Electric R.W. Co.* (1917), 55 S.C.R. 1, 37 D.L.R. 64, *per* Anglin, J., at p. 81; *Bradshaw v. Conlin* (1917), 40 O.L.R. 494, 39 D.L.R. 86; *Gazey v. Toronto R.W. Co.* (1917), 40 O.L.R. 449, 38 D.L.R. 637.

April 16. HODGINS, J.A.:—The occurrence giving rise to this action was a collision between the appellant's motor-cycle and the respondent's motor-car, at the corner of Bernard avenue and Spadina road, in Toronto.

The jury were directed by the learned trial Judge to answer questions, which they did as follows:—

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"1. Has the defendant satisfied you that the occurrence was not caused by his negligence? A. No.

"2. Did the plaintiff contribute to the occurrence by his negligence? A. Yes.

"3. If so, in what did that negligence consist? A. Excessive speed.

"4. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. Yes.

"5. If so, how? A. Driving slower.

"6. Damages, if any? A. \$3,500.

"7. If you find that the negligence of the defendant caused this accident, state fully in what the negligence consisted? (Not answered.)

"8. Notwithstanding the negligence of the plaintiff, could the defendant, by the exercise of reasonable care, have avoided the accident? A. Yes.

"9. If so, how? A. By stopping his car.

"10. Notwithstanding the negligence of the defendant, could the plaintiff, by the exercise of ordinary care, have avoided the accident? (Not answered.)

"11. If so, how? (Not answered.)"

The appellant was going east on Bernard avenue; and, when 25 feet west of Spadina road, saw the respondent's motor about 35 feet north of Bernard avenue, travelling south. Under the regulations in force at that time, the respondent had the right of way.

The appellant put on his brakes and reduced his speed, he says, from 15 miles an hour to about 12 miles, but kept straight on, and blew his horn. The respondent momentarily checked his motor; but, concluding that if he stopped he would come to a standstill directly in front of the appellant, he went on, swerving to the east, thinking to give more room. The result was a collision.

The speed of the appellant was said by the respondent to be about 35 miles an hour; that of the respondent 18 to 20 miles an hour. The appellant says that he was only going 15 or perhaps 12 to 10 miles an hour, and could have stopped in 15, 12, or 10 feet respectively. He did not do so, nor did he turn up or down Spadina road. He ran 43 feet before the motors met, and this throws doubt on the accuracy of his evidence on the question of

speed. The respondent says he could not have turned east on Bernard avenue except to its south side, owing to the narrowness of that thoroughfare.

These matters were fully canvassed in the evidence and in the charge of the learned trial Judge.

The findings of the jury summarised amount to this: that the appellant's speed was excessive, and that he could have avoided the accident if he had maintained a slower speed; and that the respondent, notwithstanding that fact, could have avoided the accident by stopping his car. In other words, both parties, by taking the precautions stated, could have escaped a collision, the one by going at a less speed and the other by stopping dead.

But for the form of the questions, no difficulty would have presented itself, as the answers of the jury indicate that each party was to blame, and their comment seems to be that recklessness on the one hand and want of prompt action on the other brought about the resultant disaster.

The learned trial Judge announced that he intended to treat the action as one of negligence against the respondent, and that on him the statutory onus rested. As to the appellant the sole question, he indicated, was that of contributory negligence, treating the statutory provision as inapplicable. He so charged the jury, and hence the form in which their findings are expressed.

I can find nothing to suggest that the respondent was guilty of ultimate negligence, nor anything to lead me to suppose that the jury's answer would have been different if the question of onus had been expressly left to them. The respondent was coming on fast, thought first of stopping, changed his mind, and went ahead. In fact his car moved continuously just as did that of the appellant, and each did, on the moment, what he thought would be best to avoid trouble. There was only one point of time at which the danger presented itself to both parties, that is, when each became visible to the other, and their consequent action was immediate, and hinged entirely upon their first perception of peril.

At that time the fault of the appellant was excessive speed and of the respondent in maintaining his course instead of stopping, and the jury thought both to blame for not then doing something to escape coming together.

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The case is like *Herron v. Toronto R.W. Co.* (1913), 28 O.L.R. 59, 6 D.L.R. 215, 11 D.L.R. 697, where each negligence arose and existed unchanged until the moment of collision, and was "concurrent and simultaneous negligence of similar character by both parties."

It is unnecessary, in the view I take of the situation, to discuss the contention that the charge to the jury should have pointed out that the statutory provision* applied to both and put each in the wrong unless he could satisfy the jury that he was free from blame. The answers really amount to such a finding, and the appeal should therefore be dismissed.

This case is another melancholy example of the desire to go fast, literally, at all hazards, and it is to be regretted that where the findings implicate both parties the appellant should be compelled to pay the costs of his associate in recklessness.

MACLAREN, J.A., and LATCHFORD, J., agreed with HODGINS, J.A.

FERGUSON, J.A.:—This is an action for damages resulting from a collision between the plaintiff's motor-cycle and the defendant's motor-car. The damages (if any) were assessed at \$3,500; but Mr. Justice Riddell, who presided at the trial, interpreted the jury's answers to the questions submitted as meaning that the accident was the result of concurrent negligence, and dismissed the action.

The plaintiff appeals, and the result of the appeal turns on the meaning of the jury's answers. The appellant contends that they mean that the defendant's negligence was the ultimate cause of the accident; the respondent supports the view adopted by the learned trial Judge.

[The learned Judge then set out the questions put to the jury and their answers, as above.]

The plaintiff's negligence in driving too fast continued to the time of the accident; but the jury appear to have been of the

* The Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 23: "When loss or damage is sustained by any person by reason of a motor-vehicle on a highway the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor-vehicle shall be upon the owner or driver."

opinion that, notwithstanding the fast driving of the plaintiff, the defendant could have avoided the accident by stopping. The answers do not, however, make it clear at just what point of time the defendant should have stopped or that he could have stopped after he became aware of the danger; neither do they make it clear that the plaintiff, after he became aware of the danger, could not himself have slowed up and thus avoided the accident. If he could, and did not do so, he is not in a position to complain. The weight of evidence favours that view. The jury, however, have not answered questions 10 and 11; and, to my mind, we are in consequence left in doubt as to the real meaning of their answers to the other questions.

Under these circumstances, I would direct a new trial; the costs of this appeal to be costs in the cause to the appellant; the costs of the former trial to be costs in the cause to the successful party.

MAGEE, J.A., agreed with FERGUSON, J.A.

Appeal dismissed; MAGEE and FERGUSON, JJ.A., dissenting.

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[APPELLATE DIVISION.]

1918
April 23.

OSHAWA BOARD OF WATER COMMISSIONERS v. ROBSON
LEATHER CO. LIMITED.

*Reference—Order Referring whole Action for Trial—Judicature Act, sec. 65 (c)
—“Matters of Account”—Claim as upon Contract for Value of Water
Wrongfully Taken—Basis of Payment.*

The plaintiff board, waiving the tort, claimed in this action the value of water wrongfully and fraudulently taken by the defendant company from the plaintiff board's mains. The defendant company submitted to pay what might be found due, and raised several contentions as to the basis upon which payment should be made:—

Held, that, the matters in dispute being “wholly or partly matters of account,” an order referring the whole action to an Official Referee for trial, was properly made under sec. 65 (c) of the Judicature Act, R.S.O. 1914, ch. 56. Order of FALCONBRIDGE, C.J.K.B., affirmed.

AN appeal by the plaintiff board from an order of FALCONBRIDGE, C.J.K.B., under sec. 65 (c)* of the Judicature Act,

* 65. In an action, . . . (c) where the question in dispute consists wholly or partly of matters of account, a Judge of the High Court Division may at any time refer the whole action or any question or issue of fact arising therein or question of account either to an Official Referee or to a special referee agreed upon by the parties.

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R.S.O. 1914, ch. 56, referring the whole action to an Official Referee for trial by him.

April 3. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and MIDDLETON, J.

R. T. Harding, for the appellant, referred to *City of Guelph v. Guelph Paving Co.* (1903), 2 O.W.R. 587, as not being applicable to the present case, and argued that the question at issue was a serious one, in which the plaintiff was entitled to its civil remedy, and not one which should be disposed of as a mere matter of account by reference to a local officer.

M. H. Ludwig, K.C., for the respondent, the defendant company, argued that the learned Chief Justice's decision was right, and that the action was properly referred under the statute. He cited Yearly Practice, 1917, Muir Mackenzie and Chitty, vol. 2, pp. 1640-1642, and cases there cited; and Holmsted's Judicature Act, 4th ed., pp. 229, 230.

Harding, in reply.

April 23: The judgment of the Court was read by MIDDLETON, J.:—This is an appeal by the plaintiff from an order of the Chief Justice of the King's Bench referring this action for trial to His Honour Judge McGillivray, as an Official Referee, under sec. 65 (c) of the Judicature Act.

The plaintiff complains that the defendant company unlawfully and fraudulently connected pipes to the plaintiff's water system, at stand-pipes for fire protection, in the defendant company's tannery, and took large quantities of water therefrom.

The plaintiff, in the words of the late Mr. Adolphus, "Assumpsit brings and God-like waives the tort," and claims for the water, at 11 cents for each hundred cubic feet, the sum of \$37,725.42.

The defendant company says, in effect, that, on several occasions when it found its own water-supply unsuitable for its purposes, and when its own waterworks were out of repair, it "used water for its tannery from the plaintiff's said service pipe," but not to the extent claimed, and submits to pay what shall be found due, raising several contentions as to the basis upon which payment should be made. After thus euphemistically describing the conduct of the defendant company, the pleader, with some sense

of humour, claims for it "that the statute commonly known as the Statute of Frauds is a bar" to the claim.

The order of reference was made at the instance of the defendant company and against the protest of the plaintiff.

All the cases shew that a wide meaning should be given to the words "matters of account" in sec. 65; and we think they are wide enough to warrant a reference in this case, as the sole matter in issue is the amount of water taken and the price that should be paid.

The course adopted seems convenient, as there will probably be much evidence of detail before the amount of water actually taken can be ascertained. The value of the water taken can easily be ascertained by the Referee, upon well-understood principles applicable where the tort is waived and the wrongdoer is called upon to pay the value of the thing taken, upon the implied contract.

The statute as it now stands differs from the corresponding provision in the Common Law Procedure Act, and authorises a reference of the whole action when the question in dispute consists wholly or partly of matters of account. The earlier Act permitted only the question of account to be referred.

The appeal should be dismissed; costs to the defendant company in the cause.

Appeal dismissed

[APPELLATE DIVISION.]

HAYS v. WEILAND.

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Jan. 28.
April 23.

Libel—Pamphlet Secretly Printed—Action against Printer—Discovery—Examination of Defendant—Undertaking to Admit Publication—Disclosure of Name of Person to whom Printed Copies Given—Relevant Fact—Name of Witness—Oppression—Purpose outside of Action—Bona Fides—Damages.

In an action for libel, based on a pamphlet printed by the defendant, who pleaded only that the document was not capable of nor intended to have the meaning attributed to it in the statement of claim, the defendant, on examination for discovery, refused to disclose the name of the person to whom he gave the copies of the pamphlet after he had printed them, and refused to answer questions the answers to which might give a clue to the identity of that person; the defendant said, however, that that person brought him the manuscript to print; and it appeared that the defendant destroyed the manuscript after printing it. The defendant undertook that at the trial he would admit publication by him of the pamphlet:—

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Held, that the name of the person referred to was a relevant fact in the case, and the plaintiff was entitled to information with regard to that fact, although it involved the disclosure of the name of a witness.

Marriott v. Chamberlain (1886), 17 Q.B.D. 154, followed

Massey-Harris Co. v. De Laval Separator Co. (1906), 11 O.L.R. 227, 591, approved.

This case did not come within either of the exceptions to the rule stated in *Marriott v. Chamberlain*: the answers to the questions would not entail anything in the nature of oppression; and the exception of a case where the question is put for a purpose outside the action is applicable only to newspapers.

Although the publication was admitted, the manner of it was relevant to the issue as to *bona fides* and upon the question of damages.

Order of MEREDITH, C.J.C.P., reversed.

MOTION by the plaintiff to commit the defendant for refusing to answer certain questions upon his examination for discovery in an action for libel.

January 28. The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court, Toronto.

G. H. Sedgewick, for the plaintiff. The defendant refused to disclose the name of the person to whom he gave the printed sheets containing the libel, and who was really the author of it, the defendant being the printer. [MEREDITH, C.J.:—For what purpose do you desire to know the man's name?] It is material to the issue. [MEREDITH, C.J.:—That is not the most substantial question on this motion; it is: Is the information sought necessary or proper for the purposes of discovery? Is it so necessary or proper that the trial should be delayed and the expense of another examination incurred? And how is it material to the issue? There is but one defendant, and he admits the publication and responsibility for all damages flowing from it if it be a libel.]

W. Lawr, for the defendant. Yes, my Lord, we have made those admissions. All they want is to discover another action.

MEREDITH, C.J.:—Do you undertake to make the admissions at the trial?

Lawr. Yes, my Lord.

MEREDITH, C.J.:—Then, Mr. Sedgewick, what need of the delay and expense now, even if the question should have been answered?

Sedgewick. The facts may be material on the question of damages.

MEREDITH, C.J.:—How? The defendant accepts responsibility

for all the injury sustained by every publication of the alleged libel, no matter whose hand passed it on.

Lawr, for the defendant, was not called upon.

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MEREDITH, C.J.:—It is too often forgotten that these examinations are examinations for the purpose of discovery only, not trials of the action. Lamentations over the abuse of them are frequent, but the better way is to prevent such abuses by confining them to their proper purpose: see *Augustine Automatic Rotary Engine Co. v. Saturday Night Limited* (1916), 36 O.L.R. 551: curtailing them to the real discovery-needs of the examining party. There has been a pretty full examination of the defendant; there should not be further delay of the trial of the action, or further costs incurred in it, unless there is some real need of it. The question is not now whether the information asked would be material to the issue upon the trial of it: and it is always better to avoid tying the hands of the trial Judge, upon a question of that kind, by an interlocutory order, if it can be avoided. *Res judicata* may prevent justice being done sometimes: and the mandate *stare decisis* is likely sometimes to be troublesome, having regard especially to its requirement under the Judicature Act—sec. 32.

For the purposes of discovery in this action there is, in view of the defendant's admission and undertaking, no real need of the information sought. Again I ask what need can there be? Surprise is out of the question—the defendant admits all publications: and saving of the expense of witnesses is, for the like reason, out of the question. If the case stood thus alone, I should not delay the trial and add to the costs of the action by directing a further examination. But it does not: the information is plainly sought for an ulterior purpose—discovering the real author of the publication, so that he may be prosecuted. It is quite proper that the plaintiff should seek and obtain, if he can, that knowledge: but it is quite improper to make discovery for the purposes of this action a cloak for discovery of another cause of action against one who is not in any way a party to this action. If, for the purposes of this action, it were necessary that a cause of action against a stranger to the action should be disclosed, ordinarily that would be an insufficient reason for refusing to disclose it: but it is not necessary, where, as here, the information is sought, not for the

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purposes of the action brought, but for the purpose of bringing another action against a stranger to the pending action, and it would be improper to require it to be given: it is improper to seek it.

The question is not one like that involved in such cases as *Thornton v. Capstock* (1883), 9 P.R. 535. It is whether the defendant should be required to furnish information to the plaintiff on examination for discovery in this action, not at all needed in this action at the present time, but needed and sought really for the purposes of another action against the man whose name has not improperly been withheld: a question which can be answered in one way only: the application must be dismissed: see *Edmondson v. Birch & Co. Limited*, [1905] 2 K.B. 523, and *Adam v. Fisher* (1914), 110 L.T.R. 537.

The plaintiff appealed from the order of MEREDITH, C.J.C.P.

February 19. The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., and KELLY, J.

R. S. Robertson, for the appellant, referred to *Chambers v. Jaffray* (1906), 12 O.L.R. 377, 382; *Humphries & Co. v. Taylor Drug Co.* (1888), 39 Ch. D. 693, which was followed in *Williamson v. Merrill* (1904), 4 O.W.R. 528; *Massey-Harris Co. v. De Laval Separator Co.* (1906), 11 O.L.R. 227, 591; see p. 593, where reference is made to *Whittaker v. "Scarborough Post" Newspaper Co.* (1896), 12 Times L.R. 488.

W. Lawr, for the respondent, the defendant, referred to *Edmondson v. Birch & Co. Limited*, [1905] 2 K.B. 523; *White & Co. v. Credit Reform Association*, [1905] 1 K.B. 653; Halsbury's Laws of England, vol. 11, p. 101, para. 167; *Marriott v. Chamberlain* (1886), 17 Q.B.D. 154; *Nash v. Layton*, [1911] 2 Ch. 71.

Robertson, in reply.

April 23. The judgment of the Court was read by HODGINS, J.A.:—Appeal by leave of Clute, J., from an order of the Chief Justice of the Common Pleas, dated the 8th January, 1918, refusing to compel the respondent to answer questions 53, 142, 147, 188, and 190 on his examination for discovery.

The action is for libel, based on a pamphlet printed by the respondent, who pleads only that the document is not capable of nor intended to have the meaning attributed to it in the statement of claim. The pamphlet refers by name to the appellant, a member of the legal profession, who went to the front; and the innuendo is that the pamphlet charges both cowardice and unprofessional conduct.

The position of the respondent, so far as these five questions are concerned, resolves itself into a refusal to give the name of the person to whom he gave the copies of the pamphlet after he had printed them. He says, however, that that person brought him the manuscript to print.

The reason of the refusal as to question 53 is, that to answer further would "have a tendency to disclose the name of the person whom we intend to call at the trial."

As to 142, the refusal is on the same ground, the question being as to whether certain named people were "acting with" him "in connection with this matter."

Question 147 inquires whether it was the respondent's intention that what he printed should come to the attention of the people already mentioned. The remaining two questions deal with specific people, and ask if they received printed copies of the pamphlet. To the first of these questions the same ground of objection is taken, and it obviously is intended to cover the remaining two.

The only question to which any plausible ground seems to be open is No. 53. The others deal with the respondent's good faith—a very important matter when, as here, his counsel argues that he was an innocent actor in the matter, merely printing what he did in the way of his trade. The respondent, who admits reading the manuscript and thinking it was "a pretty hot reply," kept it in his pocket, having been told it was secret, and destroyed it after printing it. The appellant seems to be entitled to test this phase of the matter; and the four last questions could have been answered without disclosing any names, as they had been stated by the questioner. The refusal is therefore really not on that ground, but rests upon a disinclination to afford any clue to the real offender, the writer of the manuscript.

In consequence, the true point involved in all the questions is,

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whether the fact or allegation that an answer might disclose the name of a witness is enough, in this libel case, to warrant the refusal.

It should be stated that the learned Chief Justice of the Common Pleas exacted an undertaking from the respondent that on the trial he would "admit publication by him of the printed paper containing the words complained of," and considered that with such an admission the appellant was not entitled to press for further answers.

In *Marriott v. Chamberlain*, 17 Q.B.D. 154, Lord Justice Bowen, in the Court of Appeal, sitting with Lord Esher, M.R., and Fry, L.J., said (pp. 164, 165):—

"Although one party cannot compel the other to disclose the names of his witnesses as such, yet, if the name of a person is a relevant fact in the case, the right that would otherwise exist to information with regard to such fact is not displaced by the assertion that such information involves the disclosure of the name of a witness."

This view of the law follows *Storey v. Lord Lennox* (1836), 1 Keen 341, and is itself adopted in *Humphries & Co. v. Taylor Drug Co*, 39 Ch.D. 693, 695; *Wootton v. Sievier*, [1913] 3 K.B. 499; and *Macdonald v. Sheppard Publishing Co.* (1900), 19 P.R. 282.

To this rule there are two exceptions, and both are relied on by the respondent. One is that to answer as desired would be oppressive, and the other, that the question is put for a purpose outside the action, as, for instance, that of bringing an action against some other person.

The answers to the questions would not of course entail anything in the nature of oppression. As regards the other exception, it is really a rule applicable only to newspapers, and depends upon their peculiar character and privileges. This appears from such cases as *Gibson v. Evans* (1889), 23 Q.B.D. 384, *Hennessy v. Wright* (1888), 24 Q.B.D. 445 (note), *Hope v. Brash*, [1897] 2 Q.B. 188, and *Plymouth &c. Society v. Traders Publishing Association*, [1906] 1 K.B. 403, in which the defences set up were all statutory under the Act relating to newspaper libel, and consequently the information sought possessed no relevancy.

The exception itself is founded upon considerations of policy—for, if a newspaper proprietor were compelled to give up the name

of his informant, the collection of news would be difficult; and, in the second place, if fair comment and ample apology are a defence to a newspaper, it would be difficult to deny them to the real author of the words complained of.

These considerations do not apply here, and there is no reason for extending the protection afforded to newspapers to the printer of a fugitive libel, who, after reading it, asks to be assured that it will lead to no trouble, then prints it, and destroys the manuscript.

There remains, however, the inquiry whether the name of the person to whom the copies were delivered is a material fact. It may be observed that the delivery deposed to by the respondent is not in itself necessarily publication, because the recipient was the author of the manuscript. But it was part of the publication, and publication is or may be a complex operation; and the intent and knowledge of the respondent, when delivering these copies, is an element of considerable weight in determining whether he was an innocent printer or a participant in an attack, particularly mean and unpatriotic, if the allegations were not true or believed to be so by him. The name of the person to whom the copies were given may be illuminating and indicate the purpose underlying the secrecy observed, and may even destroy the present defence and aggravate the damages. It might also tend to mitigate them if it turned out that the respondent was misled or inveigled into what he did by his friend.

The relevancy of the identity of the person to whom the copies were given may be put on several grounds. Innocency in circulating libellous matter may entirely absolve the person publishing if he shews that he was not negligent: *Vizetelly v. Mudie's Select Library Limited*, [1900] 2 Q.B. 170; *Smith v. Streetfeild*, [1913] 3 K.B. 764; *Haynes v. DeBeck* (1914), 31 Times L.R. 115.

In *Vines v. Serell* (1835), 7 C. & P. 163, Park, J., ruled that, although publication was admitted, the manner of it was competent evidence with a view to the amount of damages. This ruling was amplified in the judgment given by the Common Pleas in *Pearson v. Lemaitre* (1843), 5 M. & G. 700, after a very full argument. Tindal, C.J., there said (pp. 719, 720):—

“Either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but . . . if the

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evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of it."

Inspection of documents was granted in *Pape v. Lister* (1871), L.R. 6 Q.B. 242, though having a bearing only on the quantum of damages.

In Ontario the case seems covered in principle by the judgments of Mabee, J., and a Divisional Court, in *Massey-Harris Co. v. DeLaval Separator Co.*, 11 O.L.R. 227 and 591. In that case the name of the informant was ordered to be disclosed. On the other branch, viz., discovery of the names of the persons to whom the circular was published, Meredith, C.J. (now C.J.O.), said (p. 593): "The inquiry they desire to pursue is undoubtedly relevant to the issues in the action or some of them and on the quest on of damages."

One of the issues there was qualified privilege, which would raise not only the question of the mutual interest between the persons to whom communication was made and the publisher of the libel, but also that of malice as defeating privilege. In this case there is no defence of privilege, but innocent publication is asserted, into which the question of *bona fides*, honest belief, or malice enters, and the principle must be the same.

McKergow v. Comstock (1906), 11 O.L.R. 637, another case of privilege, contains the following statement of the law by Anglin, J. (p. 643):—

"Apart from any question of privilege *bona fides* is always material upon the question of damages. A plaintiff may offer evidence to prove lack of good faith—absence of honest belief on the part of a defendant—in order to aggravate his damages; a defendant may, in like manner, give evidence to shew that he acted in good faith to mitigate the damages: *Pearson v. Lemaitre*, 5 M. & G. 700, 719. The existence or absence of express malice is the issue to which such evidence is relevant and, as the lack of honest belief is cogent evidence of such malice, the existence of such belief goes far to negative it."

The appeal should be allowed with costs, including those of the order appealed from and the application for leave to appeal, to the appellant in any event; and an order for attendance at his own expense of the respondent, and requiring him to answer these questions, should issue.

Appeal allowed.

[APPELLATE DIVISION.]

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April 23.

REX v. RODNEY.

Criminal Law—Evidence—Admissions of Accused to Detectives—Absence of Caution—Voluntary Statements without Promise or Threat—Admissibility—Arrest.

The defendant, being suspected of stealing street-car tickets and money from his employers, a street railway company, was asked by two detectives to go with them to a police station, which he did; he was there searched, and tickets were found on him. Being asked by the detectives where he got the tickets, he voluntarily made statements which the detectives testified to upon his trial for theft. The detectives did not warn him that what he might say would be used against him. No promises were made nor threats used by the detectives. He was convicted:—

Held, upon a case stated by the trial Judge, that the absence of a caution did not make the statements inadmissible.

Ibrahim v. The King, [1914] A.C. 599, followed.

Held, also, that it was immaterial whether or not the defendant was under arrest (and *semble*, *per* LATCHFORD, J., he was) when he made the statements.

CASE stated by the Junior Judge of the County Court of the County of Wentworth, upon the trial and conviction of the defendant before him, in the County Court Judge's Criminal Court, upon a charge of having unlawfully stolen a number of street railway tickets and several sums of money, the property of the Hamilton Street Railway Company, his employers.

The defendant was, without being formally arrested, requested by two detectives to go to police headquarters in the city of Hamilton, and went with them; when at police headquarters, he was searched, and some street railway tickets were found upon his person; he was questioned by the detectives; and made statements to them which they repeated when called as witnesses at the trial. The stated case related to the admissibility of the detectives' testimony.

The learned Junior Judge stated the facts, as set out in the judgments below, and reserved for the consideration of a Divisional Court of the Appellate Division these three questions:—

"1. Was I right in admitting the evidence of detectives Shirley and Smith relating to admissions made by Rodney to them at police headquarters?

"2. Had detectives Shirley and Smith any right to question Rodney at police headquarters without having first warned him that what he might say would be used against him?

"3. Was I right in holding that he was not under arrest?"

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February 20. The case was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., and LATCHFORD and KELLY, JJ.

M. J. O'Reilly, K.C., for the defendant, referred to *Rex v. Kay* (1904), 9 Can. Crim. Cas. 403; *Regina v. Histed* (1898), 19 Cox C.C. 16; *Regina v. Male* (1893), 17 Cox C.C. 689; *Rex v. Cook* (1914), 22 Can. Crim. Cas. 241; *Rex v. Kong* (1914), 24 Can. Crim. Cas. 142; *Rex v. Wallace* (1914), 24 Can. Crim. Cas. 158. He argued that the 3rd question should be answered in the negative; that, as to the 2nd, the detectives had no right to question the accused without first giving him the customary warning; and that the evidence referred to in the 1st question was not properly admissible.

J. R. Cartwright, K.C., for the Crown, argued that it was immaterial whether or not the accused was under arrest when he was questioned at police headquarters. He referred to Joy on Confessions, ed. of 1842, pp. 34, 45. The caution was unnecessary where the prisoner's statement was not brought about by something in the nature of an inducement or threat. The following authorities were referred to: *Lewis v. Harris* (1913), 24 Cox C.C. 66; *Regina v. Day* (1890), 20 O.R. 209; *Ibrahim v. The King* (1914), 24 Cox C.C. 174, [1914] A.C. 599; the Manitoba case of *Rex v. Spain* (1917), 28 Can. Crim. Cas. 113, *per* Perdue, J.A., and *per* Cameron, J.A., at pp. 122, 123; *Rex v. Ryan* (1905), 9 O.L.R. 137; *Rex v. Steffoff* (1909), 20 O.L.R. 103; *Rex v. Colpus*, [1917] 1 K.B. 574; *Attorney-General of New South Wales v. Martin* (1909), 9 Commonwealth L.R. 713; *Rogers v. Hawken* (1898), 19 Cox C.C. 122; *Regina v. Miller* (1895), 18 Cox C.C. 54.

O'Reilly, in reply, argued that the *Lewis* case was distinguishable, because the prisoner was not in custody, and that in the *Day* case, and other cases cited on behalf of the Crown, a warning had been given. *Rex v. Kay*, *supra*, is the leading case, and is not interfered with by the authorities cited against the prisoner. He referred to *Forsyth v. Goden* (1895), 32 C.L.J. 288, and *Fleming v. Woodyatt* (1896), 32 C.L.J. 335.

April 23. MACLAREN, J.A.:—The defendant was, on the 3rd December, 1917, convicted in the County Judge's Criminal Court of the County of Wentworth of having unlawfully stolen a number of street railway tickets and several sums of money, the property of the Hamilton Street Railway Company, his employers.

The trial Judge reserved and stated a case, which set forth that the evidence shewed that on the day of the arrest the railway superintendent told the defendant he was wanted "down the street," and the two went out of the office together, and were met by two detectives, Shirley and Smith, who asked the defendant to get into a taxicab with them, and they took him to the police headquarters, where they searched him and found some street railway tickets on him. The trial Judge in the stated case proceeds to say: "He was then asked by the detectives where he got the tickets, and he then voluntarily made the statements given in evidence by the detectives. No promises were made or threats used by the detectives to the prisoner. He was not then under arrest. He was then detained on the above charge. I believe the detectives' evidence and I disbelieve the prisoner's evidence. No warning was given him by the detectives that what he might say would be used against him."

The questions reserved for the consideration of the Court are—

"1. Was I right in admitting the evidence of detectives Shirley and Smith relating to admissions made by Rodney to them at police headquarters?

"2. Had detectives Shirley and Smith any right to question Rodney at police headquarters without having first warned him that what he might say would be used against him?

"3. Was I right in holding that he was not under arrest?"

The decisions on the point as to whether the answers of a prisoner to questions put to him by a policeman or other person in authority could be received as evidence, where he was not warned or cautioned that his answers would be given in evidence against him, have not been uniform or consistent either in England or in this country. There is nothing in the law of either country which requires that a prisoner in such a case must be warned or cautioned, as is directed by sec. 684, sub-sec. 2, of the Criminal Code, at the close of the preliminary examination before a magistrate in the case of indictable offences.

In a recent case in the Privy Council, *Ibrahim v. The King*, [1914] A.C. 599, the English decisions on the point were very fully reviewed by Lord Sumner, who says at p. 609: "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him

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unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

The present case fully complies with these conditions and meets the requirements of this definition, as the trial Judge certifies in the stated case that the accused "voluntarily made the statements given in evidence by the detectives." He also states that "no promises were made or threats used by the detectives to the prisoner" and that "he was not then under arrest" when he made the admissions or confession.

Although the English Court of Criminal Appeal is not bound by the decisions of the Privy Council, the foregoing definition by Lord Sumner was approved and applied by that Court in the recent case of *Rex v. Voisin* (1918), 34 Times L.R. 263. Lawrence, J., in pronouncing the unanimous judgment of that Court, says, at p. 265, that "the general principle is admirably stated by Lord Sumner in his judgment in the Privy Council in *Ibrahim v. The King*," and adds: "It cannot be said, as a matter of law, that the absence of a caution makes the statement inadmissible. It may tend to shew that the person was not on his guard as to the importance of what he was saying or as to its bearing on some charge of which he has not been informed." See also, to the same effect, *Rex v. Colpus* (1917), 12 Cr. App. R. 193, [1917] 1 K.B. 574.

There have been also recent decisions in this Court to the same effect, by which we are bound, as well as by the decision in the Privy Council to which reference has been made. The latest of these to which we have been referred are: *Rex v. Ryan*, 9 O.L.R. 137, and *Rex v. Steffoff*, 20 O.L.R. 103.

In *Rex v. Spain*, 36 D.L.R. 522, 28 Can. Crim. Cas. 113, the Manitoba Court of Appeal lays down the same rules.

The first and second questions should consequently be answered in the affirmative. It therefore becomes unnecessary to answer the third question, as the above authorities shew that, even if the appellant was under arrest at the time, the first and second questions should be answered in the affirmative.

If he was not under arrest, then *â fortiori* the same answers should be given.

MAGEE and HODGINS, J.J.A., agreed with MACLAREN, J.A.

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LATCHFORD, J.:—Case reserved and stated under sec. 1014 of the Criminal Code by J. F. Monck, Esquire, Junior Judge of the County of Wentworth, sitting as Judge of the County Court Judge's Criminal Court of the County of Wentworth at Hamilton.

On the 3rd December, 1917, George Rodney was tried before the said County Court Judge's Criminal Court upon the following indictment:—

“For that the said George Rodney, within six months last past, at the city of Hamilton, in said county, did unlawfully steal a number of street railway tickets and several sums of money, the property of the Hamilton Street Railway Company, his employers.”

At the said trial, evidence was adduced by the prosecution and defence that on the day the prisoner George Rodney was taken in custody, he, the said George Rodney, reported for work at the office of the Hamilton Street Railway Company in Hamilton, whereupon the superintendent of the Hamilton Street Railway Company, in charge of the said office, told Rodney that a fellow wanted to meet him (Rodney) “down the street;” the superintendent then accompanied Rodney to King street between James and Hughson streets, Hamilton, where they were met by two Hamilton detectives, Shirley and Smith, who had a taxicab in waiting; Rodney was then told to get into the taxicab, and the two detectives accompanied Rodney to the police headquarters. Rodney was then, at the police headquarters, searched by the detectives, and some street railway tickets were found on him. He was then asked by the detectives where he got the tickets, and he then voluntarily made the statements given in evidence by the detectives. No promises were made or threats used by the detectives to the prisoner. He was not then under arrest. He was then detained on the above charge. I believe the detectives' evidence and I disbelieve the prisoner's evidence. No warning was given him by the detectives that what he might say would be used against him. I admitted as evidence what detectives Shirley and Smith testified was said by Rodney at the police headquarters to them, and convicted the prisoner of the offence charged, and judgment on the said conviction was postponed until the questions hereinafter stated should be decided.

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The said George Rodney has been discharged on recognizance of bail to appear and receive judgment.

The questions reserved for the consideration of the Court are:—

"1. Was I right in admitting the evidence of detectives Shirley and Smith relating to admissions made by Rodney to them at police headquarters?

"2. Had detectives Shirley and Smith any right to question Rodney at police headquarters without having first warned him that what he might say would be used against him?

"3. Was I right in holding that he was not under arrest?"

It is obvious that question No. 1 is the important question. If it were necessary to answer No. 3, I should be disposed to say that, while Rodney had not formally been arrested, he was in the custody of the detectives. Physical custody is not necessary to make evidence of a confession inadmissible: *Rex v. Booth and Jones* (1910), 5 Cr. App. R. 177, at p. 180. But the prisoner, having been subjected to search at police headquarters, was, in my opinion, in the same situation as to any admissions which he made as if he had been formally arrested.

The main question accordingly is this: Was the learned Judge right in admitting the evidence of what Rodney had stated to the detectives in answer to their questions while he was in their custody?

That evidence, if credited, as it was, was conclusive as to Rodney's guilt. He admitted the theft of the street car tickets, told by what means he had obtained them from the fare-boxes, and indicated where he had hidden the instrument which he had used. Rodney, when giving evidence on his own behalf, stated that he did not remember what he told the detectives, and that he did not know where the tickets found in his pockets came from.

The question raised is by no means new, and it has been the subject of much discussion in the Courts.

In *Regina v. Day*, 20 O.R. 209, statements made by the prisoner while in custody were admitted by Rose, J., who, however, in view of the decision in *Regina v. Gavin* (1885), 15 Cox C.C. 656, reserved a case for the consideration of the Queen's Bench Division. It came on to be heard before a very strong Court—Armour, C.J., and Falconbridge and Street, JJ. All the cases up to that

time were cited, but reliance was chiefly placed by counsel for the prisoner on the *Gavin* case and by counsel for the Crown on *Regina v. Johnston* (1864), 15 Ir. C.L.R. 60. The Chief Justice, in delivering the judgment of the Court, said: "We think, although we reprehend the practice of questioning prisoners, that we cannot come to the conclusion that evidence obtained by such questioning is inadmissible. The great weight of authority in England and Ireland, and all the cases in which the point has been considered by a Court for Crown Cases reserved, go to shew that the evidence is admissible."

Mr. O'Reilly seeks to distinguish this case from the case at bar, owing to the fact that the prisoner had been given the usual caution. But, as the caution, according to the Chief Justice, was "a very illusory caution," the case was decided as if no caution was given.

Regina v. Gavin, which was the decision of a single Judge, received its quietus in the Court of Criminal Appeal—Alverstone, L.C.J., and Channell and Walton, JJ.—in *Rex v. Best*, [1909] 1 K.B. 692: "In our opinion *Regina v. Gavin* is not a good decision."

The test by which the admissibility of a confession should be determined was stated by Cave, J., in *Regina v. Thompson*, [1893] 2 Q.B. 12, at pp. 17, 18: "They (the magistrates) have to ask, Is it proved affirmatively that the confession was free and voluntary—that is, Was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not been clearly removed before the statement was made, evidence of the statement is inadmissible . . . It is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary." Holding that the magistrates had not discharged themselves of this obligation, the Court quashed the conviction.

In *Rogers v. Hawken*, 67 L. J. Q. B. 526, 19 Cox C.C. 122, Lord Russell of Killowen, referring to *Regina v. Male*, 17 Cox C.C. 689, said: "I should like to say that the observations made by Mr. Justice Cave in that case were perfectly just, but that they must not be taken to lay down the proposition that a statement of the accused made to a police-constable without threat or inducement is not in point of law admissible. There is no rule of law excluding statements made in such circumstances, and such a

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rule might be most mischievous and a hardship upon a falsely accused person." The evidence was held admissible because there was "no ground for a suggestion that it was made in reply to a threat or upon any inducement."

In the recent case of *Ibrahim v. The King*, [1914] A.C. 599, Lord Sumner, in delivering the judgment of the Privy Council, says (p. 609): "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained by him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." The leading cases on this point are concisely reviewed and the varying trends of judicial opinion noted. The accused, an Afghan in a British regiment of native troops, was a prisoner in the guard-room and in bonds, when a British officer approached him and said, referring to the killing, a short time previously, of Ibrahim's subadar, "Why have you done such a senseless act?" Nothing else was said. Ibrahim answered in Hindustani: "Some three or four days he has been abusing me; without a doubt I killed him." The trial Judge admitted evidence of the prisoner's statement. There was, it may be said, other evidence pointing to Ibrahim as the murderer of his company commander. The jury failed to agree on this first trial, but upon a second trial Ibrahim was convicted and sentenced to death. Upon an appeal, based mainly, it would appear, on the question of the jurisdiction of the trial Court, the conviction was affirmed. Pending that appeal and the further appeal to the Judicial Committee the sentence was respited. Before the Committee, the question arose as to the admissibility of the prisoner's statement. Lord Sumner, in delivering the judgment of the Privy Council, said (p. 614): "The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many Judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others, less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court

of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice has occurred. If, then, a learned Judge, after anxious consideration of the authorities, decides in accordance with what is at any rate a 'probable opinion' of the present law, if it is not actually the better opinion, it appears to their Lordships that his conduct is the very reverse of that 'violation of the principles of natural justice' which has been said to be the ground for advising His Majesty's interference in a criminal matter. If, as appears even on the line of authorities which the trial Judge did not follow, the matter is one for the Judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think . . . that in the circumstances of this case his discretion is not shewn to have been exercised improperly."

In the recent case of *Rex v. Colpus*, 12 Cr. App. R. 193, Lord Reading says (p. 200) that the rule cannot be better stated than in the words of Lord Sumner.

Rex v. Kay, 9 Can. Crim. Cas. 403, was relied upon by Mr. O'Reilly. That, however, was but the decision of a trial Judge, who considered that the arrest, combined with the charge of murder, constituted an inducement. The case may have been properly decided in the circumstances, but it cannot, I think, be regarded as laying down a rule of general application.

It is not, in my opinion, the fact that an accused person was under arrest that determines whether a statement made by him to a constable or other person in authority is admissible, though that fact is of undoubted importance, and should receive careful consideration when evidence of a statement so made is proffered. Nor is the absence of warning the determining factor in such a case. The utmost circumspection should, no doubt, be exercised in the reception of evidence of statements made in such circumstances.

Before admitting evidence of statements so made, the magistrate or Judge should be satisfied that no inducement whatever has been held out to the accused by any person having authority over him or concerned in the subject-matter of the charge. But, if satisfied that the statement has not been obtained by fear of prejudice or hope of advantage held out by a person in authority, he

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should, in my opinion, declare the evidence admissible. The matter is largely, if not entirely, one of discretion, to be exercised in accordance with the rule laid down by Lord Sumner.

In the present case the evidence of Rodney's statement, made while he was in custody, though not formally under arrest, and in the absence of the usual, and I may add proper, caution, was admissible. The first question should be answered in the affirmative.

In view of what I have stated, it is unnecessary to answer either the second or third question.

KELLY, J.:—My opinion is that, in the circumstances which arise in this case, the admission in evidence of the statements made by the accused to the detectives cannot, under the authorities, be held to have been improper, the statements having been voluntary.

Conviction affirmed.

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April 23.

[APPELLATE DIVISION.]

WHEELER v. HISEY.

Principal and Agent—Contract Made by Son in Respect of Father's Farm—Authority to Land Agents to Sell—Exclusive "Listing" for Defined Period—Sale during Period without Intervention of Land Agents—Action by Land Agents for Commission—Finding of Jury—Failure to Shew Ratification by Father—Absence of Full Knowledge—Right of Land Agents against Son.

In order that a person may be deemed to have ratified an act done without his authority, it is necessary that at the time of the ratification he should have full knowledge of all the material circumstances in which the act was done, unless he intends to ratify the act and take the risk whatever the circumstances may have been.

In an action by land agents against a father and son to recover a commission upon the sale-price of the father's farm, it appeared that the son had "listed" the farm with the plaintiffs for sale, and had told his father that he had done so, but had not told him (as was the fact) that he had given the plaintiffs an exclusive authority to sell, good for 90 days. The father was satisfied with the "listing" having been made; but, on the evidence, would not have approved the exclusive authority if he had known of it. The farm was in fact sold without the intervention of the plaintiffs, and not in consequence of their introducing the purchaser:—

Held, that there was no ratification of the son's act by the father.

Held, also, that the finding of the jury that the son, after consulting his father, became his agent, and therefore the father became responsible for the commission, was not a finding sufficient in the circumstances to warrant a verdict for the plaintiffs against the father.

Judgment of the County Court of the County of Simcoe, in favour of the plaintiffs against the father, reversed.

Held, also, that the plaintiffs were not, on the pleadings and evidence, entitled to a judgment against the son; but the dismissal of the action as against him should be without prejudice to the plaintiffs bringing another action against him, based upon a contract by him to pay the commission in the event of a sale being made within 90 days.

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AN appeal by the defendant Abraham Hisey from the judgment of the Senior Judge of the County Court of the County of Simcoe, upon the findings of a jury, in favour of the plaintiffs, who were land agents, for the recovery of a sum of money as commission on the price (\$9,000) at which the appellant sold his farm; and a cross-appeal by the plaintiffs from the same judgment in so far as it dismissed the action against the defendant Norman Hisey.

The defendants were father and son; the father (Abraham) owned the farm; but it was the son (Norman) who "listed" it for sale with the plaintiffs; by a writing which the son signed, the plaintiffs were given "the exclusive sale of my property" —describing the farm—"good for 90 days," "and in case of a sale being made I will pay to them a commission of 2 per cent. on the selling price."

The sale upon which the plaintiffs claimed commission was not made by them, but by the defendants or one of them.

The finding of the jury was as follows:—

"Norman Hisey, after consulting his father, became his agent; therefore Abraham Hisey becomes responsible for commission."

Upon this, judgment was entered for the plaintiffs against the defendant Abraham Hisey, and in favour of the defendant Norman Hisey, as above.

March 11 and 12. The appeal and cross-appeal were heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

W. A. Boys, K.C., for the appellant and for the respondent in the cross-appeal. The defendant Norman Hisey did not, in entering into the agreement, assume to act for the appellant. The son did not tell his father that he had given the plaintiffs exclusive authority to sell the farm. The evidence shewed that the plaintiff Holbrook had told Norman Hisey that there would be no commission payable to the plaintiffs if the farm should be sold by the father. There had been no ratification by the appellant of the contract entered into by his son with the plaintiffs; and, therefore, the appellant could not be bound: *Keighley*

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Maxsted & Co. v. Durant, [1901] A.C. 240. In order that ratification of an unauthorised act may be valid, the principal must have full knowledge, at the time of the ratification, of all material facts relating to the unauthorised transaction: 31 "Cyc." 1253, 1257; *Forman & Co. Proprietary Limited v. The Ship "Liddesdale,"* [1900] A.C. 190; *Cross and Co. v. Matthews and Wallace* (1904), 20 Times L.R. 603; *Taylor v. Davenport* (1910), 14 W.L.R. 257.

D. L. McCarthy, K.C., for the plaintiffs, the respondents and cross-appellants, contended that the judgment against Abraham Hisey should stand. It had been denied that Holbrook told Norman Hisey that there would be no commission payable if the father sold the farm. Ratification by the father had been proved. That being so, the relation of principal and agent had been constituted retrospectively: Halsbury's Laws of England, vol. 1, p. 173. If the Court should be of opinion that the judgment against Abraham cannot stand, the plaintiffs should have judgment against Norman.

Boys, in reply

April 23. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the defendant Abraham Hisey from the judgment of the County Court of the County of Simcoe, dated the 29th January, 1918, which was directed to be entered on the findings of the jury, after the trial of the action before the Senior Judge of that Court on the 16th January, 1918.

The respondents are land agents, and sue for the recovery of a commission of 2 per cent. on the purchase-price of the appellant's farm, which he sold for \$9,000.

The employment of the respondents as agents to sell was by the defendant Norman Hisey, the son of the appellant, and was evidenced by the following document:—

"Stayner, Oct. 20th, 1916.

"I hereby give to Messrs. Wheeler & Holbrook, Stayner, the exclusive sale of my property known as lot 11 concession 3 Township of Notawasaga, and in case of a sale being made I will pay to them a commission of 2 per cent. on the selling price.

"Good for
90 days."

"Name, Norman Hisey.

"Address, Stayner, R.R. No. 2 (L.S.)"

The farm, which consisted of one half—not the whole—of lot 11, was owned by the appellant, and the son had no interest in it, but he owned the stock on the farm, and had made some improvements on it, and would probably have become the owner of it at his father's death.

The respondents testified that their understanding at the time this document was signed was, that the son had an interest in the farm.

There was a conflict of evidence as to what occurred at the time the document was signed. According to the testimony of the son, the understanding was that no commission should be payable if the farm were sold by him. This was denied by the respondents, who testified that Norman Hisey was told by them that they would be entitled to the commission even if a sale were made by him. It must be taken that the jury accepted the testimony of the respondents on this point.

It is clear upon the evidence that the son did not assume, in entering into the agreement, to act for his father. The only mention of the father that was made was in what was said by the son after the document was signed, and what he said was, that he would see his father and that if his father was not satisfied he would let the respondents know.

On returning home, the son informed his father that he had "listed" the farm with the respondents, but he did not tell his father that he had given an exclusive authority to sell to the respondents. The father was satisfied with the listing having been made; but the proper conclusion upon the evidence is, that, if he had been told that an exclusive authority to sell had been given and that the commission would be payable if the farm were sold, as it afterwards was, without the intervention of the respondents and not in consequence of their introducing the purchaser, he would not have sanctioned it.

Some days after, in consequence of something that was said by a commercial traveller, who was asked by the appellant to try to find a purchaser for the farm, the son went to the office of the respondents in order to ascertain if the authority he had signed was an exclusive one. Here again there was a direct conflict between the son and the respondents. According to the testimony of the son, the respondent Holbrook told him that no commission

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would be payable to them if the farm were sold by his father. Holbrook was asked:—

“186. Q. If Norman Hisey says he did come in and asked what the word ‘exclusive’ meant, he having got information in the meantime, what do you say?”

And his answer was: “I say it is wrong. Only the discussion about the farm.”

I understand this to be a denial that Norman Hisey had seen him (Holbrook) after the document was signed for the purpose of making such an inquiry, and indeed the testimony of the respondents is, that they did not see Norman Hisey after the document was signed until he came in in response to a letter from them requesting payment of the commission on the sale which had then been made.

The attention of the jury was not directed to this point in the case, and it has not been passed upon by them. The proper conclusion as to it is, I think, that the testimony of Norman Hisey should be accepted. The probabilities are all in favour of his having gone to make the inquiry that he said he made. The question as to the authority being an exclusive one arose before the sale of the farm, and there is the testimony of the father that his son was sent to make the inquiry.

Even if that conclusion is not warranted, there was, in my opinion, no ratification of his son’s act by the appellant. He was not informed of the important provision of the agreement his son had made—that the respondents were to have for 90 days the exclusive right of selling the farm—and it is clear upon the evidence that, if he had known that, he would not have sanctioned what had been done. The most that he intended to ratify and did ratify was the listing of the farm with the respondents, which ordinarily means that the agent is to receive a commission in the event of a sale being effected through his instrumentality.

In order that a person may be deemed to have ratified an act done without his authority, it is necessary that at the time of the ratification he should have full knowledge of all the material circumstances under which the act was done, unless he intends to ratify the act and take the risk whatever the circumstances may have been: Bowstead on Agency, 5th ed., p. 507, and cases there cited; and of any such intention there is no evidence, nor can the inference properly be drawn that he so intended.

All that the jury found was that:—

“Norman Hisey, after consulting his father, became his agent; therefore Abraham Hisey becomes responsible for commission.”

This is not a finding sufficient in the circumstances to warrant a verdict for the respondents against the appellant.

Upon the whole, I am of opinion that, for these reasons, the verdict should be set aside and judgment entered dismissing the action against the appellant.

As I have come to this conclusion, it is not necessary to consider the other grounds urged by the appellant's counsel in support of the appeal.

It was contended that, if the judgment against the appellant cannot stand, the respondents are entitled to judgment against Norman Hisey, but I am not of that opinion. No case on that footing is made on the pleadings, and the judgment dismissing the action as against him should stand, without prejudice to the respondents, if so advised, bringing another action against him, based upon a contract by him to pay the commission in the event of a sale being made within 90 days.

The result is, that the verdict against the appellant is set aside, and judgment is to be entered dismissing the action as against him, with costs here and below; and the cross-appeal is dismissed; but, under all the circumstances, the dismissal should be without costs.

Appeal allowed; cross-appeal dismissed.

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[APPELLATE DIVISION.]

April 23.

ARMSTRONG CARTAGE AND WAREHOUSE CO. v. GRAND TRUNK
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*Railway—Highway Crossing—Negligence of Gateman—Injury to Vehicle
Attempting to Cross Tracks—Evidence—Position of Gates—Findings of
Jury—Contributory Negligence.*

The plaintiff's laden motor-truck was being driven by the plaintiff's servant southward upon a street in the city of H.; when it came to the line of the defendant's railway crossing that street, the gates which, under the authority of the Board of Railway Commissioners of Canada, had been placed on the north and south sides of the line, were or appeared to the driver to be up, and he attempted to cross; the truck passed under the north gate and got upon the track, where it was struck by an east-bound train; this action was brought to recover damages for injury to the truck and the goods it was carrying; and the jury (in answer to questions) found (1) negligence of the defendant, (2) "by not having the north gate lowered soon enough," and (3) no contributory negligence of the plaintiff's driver. The evidence as to the position of the gates was conflicting:—

Held, in view of the evidence, that the meaning to be given to the jury's second answer was that they were unable to find that the south gate was up, but that they found that the north gate was not lowered when the truck reached it, and that this was an intimation to the driver that he might safely cross the tracks; that there was evidence to support this finding, and also the finding against contributory negligence; and the judgment for the plaintiff, directed by FALCONBRIDGE, C.J.K.B., to be entered upon the findings, should not be disturbed.

The leaving of the north gate open was evidence of negligence to go to the jury, and it was so even though with care and circumspection the driver of the truck might have been able to see at a distance the approach of the train which did the injury.

North Eastern R.W. Co. v. Wanless (1874), L.R. 7 H.L. 12, and *Smith v. South Eastern R.W. Co.*, [1896] 1 Q.B. 178, followed.

AN appeal by the defendant company from the judgment of FALCONBRIDGE, C.J.K.B., on the findings of a jury, at the trial at Hamilton, in favour of the plaintiff company, in an action for damages for injury caused to a motor-truck of the plaintiff company, and the goods the truck was carrying, owing, as the plaintiff company alleged, to the negligence of the defendant company's gateman, at a highway crossing in the city of Hamilton, in allowing the plaintiff company's truck to pass the north gate and get upon the railway lines at a time when there was danger from an approaching train, by which the truck was then struck, which was the cause of the injury of which the plaintiff company complained.

The jury found negligence of the defendant company, "by not having the north gate lowered soon enough," and no contributory negligence on the part of the driver of the plaintiff company's truck.

March 15. The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

S. F. Washington, K.C., for the appellant company. There was no evidence upon which reasonable men could base the finding of negligence against the defendant company, or which could justify the answer to the second question. Even if there was evidence of negligence on the part of the defendant company, yet the negligence which caused the accident was the omission by the plaintiff company's driver to use such care as a reasonable man should have used in the circumstances: *Davey v. London and South Western R.W. Co.* (1883), 12 Q.B.D. 70; *Peart v. Grand Trunk R.W. Co.* (1884), 10 A.R. 191. The driver was negligent in not noticing the condition of the south gate, and in not looking up and down the track before attempting to cross: *Wabash R.R. Co. v. Misener* (1906), 38 S.C.R. 94, at p. 100; *Grand Trunk R.W. Co. v. McAlpine*, [1913] A.C. 838, 13 D.L.R. 618. There was no invitation to the driver to cross the tracks: *Skelton v. London and North Western R.W. Co.* (1867), L.R. 2 C.P. 631; *Stubbley v. London and North Western R.W. Co.* (1865), L.R. 1 Ex. 13.

George Lynch-Staunton, K.C., for the plaintiff company, respondent. There was ample evidence to justify the answers of the jury, and the findings cannot be disturbed. The north gate being up was an invitation to the plaintiff company's driver to cross the tracks, even if the south gate was down unobserved by him. The jury have passed upon this: *Columbia Bitulithic Limited v. British Columbia Electric R.W. Co.* (1917), 55 S.C.R. 1, 37 D.L.R. 64; *Smith v. South Eastern R.W. Co.*, [1896] 1 Q.B. 178. The leaving of the north gate open was evidence of negligence to go to the jury, and they have found negligence: *North Eastern R.W. Co. v. Wanless* (1874), L.R. 7 H.L. 12. The plaintiff company's driver was not guilty of any contributory negligence.

Washington, in reply.

April 23. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 29th January, 1918, which was directed by the Chief Justice of the King's Bench to be entered on the findings of the jury, at the trial before him at Hamilton on that day.

The action is brought to recover damages for injuries caused to

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a motor-truck of the respondent, and the goods it was carrying, owing, it is alleged, to the negligence of the appellant.

The motor-truck was injured by being struck by an east-bound train of the appellant, while the truck was being driven across the tracks of its line on Lottridge street.

The appellant has, under the authority of the Board of Railway Commissioners of Canada, erected gates on the north and south sides of its line on Lottridge street, in the city of Hamilton, and it is not disputed that it was the duty of the appellant to keep these gates closed when there was danger to persons crossing the tracks from an approaching train; nor is it open to question that, when the gates are not down, the travelling public is told that the tracks may be safely crossed without danger from an approaching train.

The truck was being driven by a man named Henry Ince, and was proceeding, heavily laden, southward on Lottridge street.

What happened I shall afterwards mention in dealing with the answers of the jury to the questions submitted to them by the learned trial Judge.

The relevant questions and the answers to them are as follows:—

“1. Was the injury to the plaintiff’s motor-truck caused by any negligence of the defendants? A. Yes.

“2. If so, wherein did such negligence consist? A. By not having the north gate lowered soon enough.

“3. Was the plaintiff’s driver guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened? A. No.”

In order to ascertain what the jury meant by their answer to the second question, it is necessary to consider the evidence as to the position of the gates, which was conflicting.

According to the testimony of Ince and of Oscar Smith, who was riding with him on the truck, both the gates were up when the truck reached the railway tracks.

Daniel Jones, the man in charge of the gates, testified that he saw the east-bound train approaching, when it was distant about half a mile; that he started to lower the south gate behind a young lady who was about to cross the tracks from the south, and that he then started to lower the north gate “as she was coming to go under;” and that, just as she was crossing the last track, i.e., the

north one, "the truck came with a dash and took advantage of the gate being half-way up and went through at a fair rate of speed;" that he held the north gate half-way up to let the young lady pass; that the south gate was then down; that he had seen the truck coming when it was at the curve in the street near the creamery, about a block away; that the truck went on; and that, thinking that the driver was going to make a rush right over, he went to move the south gate to give him a chance to get through.

Florence Solly, the young lady, testified that when she got to the south gate it was being lowered, and after she went through it came down behind her; that the north gate "was just lowering down;" and that the truck came along and came under, and the gateman had to pull the gate up again to let the truck under; that the north gate was not put down while she was crossing the tracks; that, when she crossed, the truck was about underneath the north gate; that the north gate was moving when she went under it; that the gateman started to put down the north gate before she passed it; that the truck was then right up to that gate; and that the gateman pulled it up again to let the truck through.

In view of this evidence, the meaning to be given to the jury's answer to the second question is, I think, that they were unable to find that the south gate was up, but that they found that the north gate was not lowered when the truck reached it, and that this was an intimation to the driver that he might safely cross the tracks.

It cannot, in my opinion, be said that there was not evidence to support this finding. The jury acquit the driver of contributory negligence, and must therefore have come to the conclusion that he was not negligent in not noticing the condition of the south gate.

It is impossible to say that as a matter of law the condition in which the south gate was, prevented the condition of the north gate from being taken to have been an intimation to the driver that he might safely cross the tracks, or that the driver was negligent in failing to observe that the south gate was down. These were matters for the consideration of the jury, and we cannot say that their findings as to them are such that a jury might not reasonably have made them.

Oddly enough, in the case of *North Eastern R.W. Co. v. Wanless*,

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L.R. 7 H.L. 12, which was the case of a railway crossing protected by gates, there was, as in this case, contradictory evidence as to whether the gate on the opposite side of the track to that by which the injured person entered upon the line was or was not open.

That case is authority for the proposition that the leaving of the north gate open was evidence of negligence to go to the jury, and that it was so even though with care and circumspection the driver of the truck might have been able to see at a distance the approach of the train which did the injury.

The statement of the gateman that when the truck was "going under"—that is, passing the north gate—he shouted to the driver, "Stay where you are," indicates, I think, that the gateman then recognised that the driver had been led, by the position in which the north gate was, to get where he was, and that he was endeavouring to avoid the effect of his—the gateman's—failure to lower the north gate in time.

It is not without significance on the question of contributory negligence that the driver of the engine of the train, who was on the look-out, did not see the truck until, it was just approaching the west-bound track; and that the train which was travelling at a rate of between 35 and 40 miles an hour, was then only between 300 and 400 feet from the truck. The engine-driver had a much better view of the track to the east than the driver of the truck had, for there is a large building abutting on the railway line and coming almost up to the west side of Lottridge street, which prevented the driver from looking along the tracks to the west until after he had passed the north gate.

The jury, in view of all the circumstances, as I have said, acquitted the driver of the truck of contributory negligence. That question was one eminently for the jury, and I see nothing that would warrant us in setting aside their finding as to it.

As was said in *Smith v. South Eastern R.W. Co.*, [1896] 1 Q.B. 178, it was a question for the jury whether the driver of the truck, finding that the north gate was up, might not reasonably have supposed that he could safely cross the rails without taking the precaution of looking up and down the line or listening for the whistling of a train.

In my judgment, it would require an extremely strong case to defeat an injured person's claim because, after entering upon the

railway tracks, he had failed to look for an approaching train. The gate being open, he was in effect told, "You may cross the tracks in safety;" and it would be anomalous indeed that, having told him this, the railway company may say to him in effect, "You ought not to have believed what we told you, but have looked out yourself to see if there was danger from an approaching train;" and I do not wonder that juries do not look with favour upon such a defence.

I would dismiss the appeal with costs.

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Appeal dismissed.



APPENDIX I.

SUPREME COURT OF ONTARIO.

At a meeting of the Judges held on the 15th October, 1918, the following Rule was passed:—

Owing to the increased cost of living and office expenses due to the present War, it is ordered that until further order the total in any bill of costs of the fees prescribed by Tariff "A" (as distinct from payments), shall in respect of business done in any cause or matter in the Supreme Court or any County Court be increased by twenty per cent., and such increase shall be allowed upon any taxation of costs in respect of any such business as well between party and party as between solicitor and client.

(1) This Rule shall not apply to the allowance for commission and disbursements pursuant to Rule 653, nor shall it interfere with the power to allow a fixed sum for costs, nor shall it apply to counsel fees.

(2) This Rule shall apply only to fees for services rendered after this Rule goes into effect.

This Rule shall come into force on the 16th day of October, 1918.

APPENDIX II.

Ontario cases decided on appeal to the Supreme Court of Canada* and reported since the publication of vol. 41 of the Ontario Law Reports:—

SHAW v. HOSSACK, 40 O.L.R. 475, reversed in part by the Supreme Court of Canada: HOSSACK v. SHAW, 56 S.C.R. 581.

UNION NATURAL GAS CO. v. CHATHAM GAS CO., 40 O.L.R. 148, reversed by the Supreme Court of Canada: UNION NATURAL GAS CO. v. CHATHAM GAS CO., 56 S.C.R. 253.

VELTRE v. LONDON AND LANCASHIRE FIRE INSURANCE CO. LIMITED, 40 O.L.R. 619, affirmed by the Supreme Court of Canada: LONDON AND LANCASHIRE FIRE INSURANCE CO. v. VELTRE, 56 S.C.R. 588.

*No Ontario cases decided on appeal to the Judicial Committee of the Privy Council have been reported since the publication of vol. 41 of the Ontario Law Reports.

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Assignment for Benefit of Creditors—Interest of Assignor under Lease of Land and in Building Erected thereon—Assignment to Creditor as Security for Debt—Subsequent Chattel Mortgage on Building (Treated as Chattel) to another Creditor—Priorities—Construction of Lease—Reservation—License—Building Annexed to Freehold—Ineffectiveness of Chattel Mortgage—Impeachment under Assignments and Preferences Act, sec. 5 (1)—Intent—Bona Fides—Sec. 6 (1)—Present Actual Advance of Money—Findings of Trial Judge.]—E. (a trader) was the lessee of land for 10 years, under an instrument, executed in 1909, purporting to be a lease made pursuant to the Short Forms of Leases Act, with a reservation in favour of the lessor of all mines and minerals on and under the land with a right to work the same, and containing a provision that the lessor might at any time, on giving the lessee 6 months' notice, determine the term, whereupon the lessor should pay to the lessee the fair value of any building erected on the land. E. erected upon the premises a brick building with a cement foundation. In 1913, E., being indebted to the plaintiff S., executed in his favour a deed of trust or assignment of her interest in the building, as security for the payment of her indebtedness, present and future,

ASSETS & PREFERENCES.—(Continued).

to him; and, in 1916, executed in favour of the defendant a chattel mortgage upon her interest in the building. Subsequently E. made an assignment, under the Assignments and Preferences Act, for the general benefit of creditors, to the plaintiff M. In this action (brought within 60 days after the making of the chattel mortgage) the plaintiff S. asserted the priority of his security to the defendant's chattel mortgage, and both plaintiffs asserted that the chattel mortgage was void as against creditors:—*Held* (RIDDELL, J., expressing no opinion, and FERGUSON, J.A., dissenting), that the building when erected became part of the land and passed to the lessor; it was not intended to be a trade-fixtured or a chattel that might be removed; the instrument under which E. took an interest in the land was a lease, and not a license; the chattel mortgage conveyed nothing to the defendant; and any interest which E. had under the lease passed to M., subject to the claim of S. upon his security.—The trial Judge found that the sum of \$2,500 was actually advanced by the defendant to E. at the time she made the chattel mortgage; he also found facts which brought the case within sec. 5 (1) of the Act, unless the advance was made *bonâ fide* within sec. 6 (1); but he did not find that the defendant took the impeached security with intent to defeat, hinder, or delay creditors, and he did not find that the

ASSTS. & PREFS.—(*Continued*). security was not given in consideration of a present actual *bonâ fide* payment in money:—*Held* (FERGUSON, J.A., dissenting), that the express findings were sufficient to negative the *bona fides* of the transaction, and that the defendant's security, upon the second ground also, had been successfully impeached. *Struthers v. Chamandy*, 508.

AWARD.

See ARBITRATION AND AWARD—HUSBAND AND WIFE, 1.

BANKRUPTCY AND INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES—COMPANY, 5, 6.

BANKS AND BANKING.

See EXECUTORS AND ADMINISTRATORS, 2.

BENEFICIARY.

See INSURANCE, 3, 4, 5—TRUSTS AND TRUSTEES.

BEQUEST.

See WILL.

BILLS OF SALE.

See ASSIGNMENTS AND PREFERENCES—CHATTEL MORTGAGE.

BOARD OF RAILWAY COMMISSIONERS.

See EXECUTION.

BOUNTY OF CROWN.

See WILL, 4.

BRIDGE.

See MUNICIPAL CORPORATIONS, 3.

BRITISH NORTH AMERICA ACT.

See DIVISION COURTS, 1.

BUILDINGS.

See ASSIGNMENTS AND PREFERENCES — INSURANCE, 1 — LANDLORD AND TENANT, 1—MECHANICS' LIENS.

BUSINESS.

See HUSBAND AND WIFE, 4, 5.

BY-LAWS.

See COMPANY, 1, 2, 3—INSURANCE, 2—MUNICIPAL CORPORATIONS, 1, 2, 3—STREET RAILWAY, 2.

CASES.

Admiralty Commissioners v. S.S. Amerika, [1917] A.C. 38, followed.]—See EXECUTORS AND ADMINISTRATORS, 1.

Arnold & Butler v. Bottomley, [1908] 2 K.B. 151, followed.]—See SLANDER, 1.

Ashbury Railway Carriage and Iron Co. v. Riche (1875), L.R. 7 H.L. 653, specially referred to.]—See COMPANY, 4.

Baker v. Bolton (1808), 1 Camp. 493, followed.]—See EXECUTORS AND ADMINISTRATORS, 1.

Bank of Montreal v. Stuart, [1911] A.C. 120, followed.]—See HUSBAND AND WIFE, 6.

Bernina, The (1888), 13 App. Cas. 1, followed.]—See NEGLIGENCE, 1.

Beverley, Mayor etc. of, v. Attorney-General (1857), 6 H.L.C. 310, 318, followed.]—See WILL,

Bolt and Iron Co., Re, Livingstone's Case (1887-88), 14 O.R. 211, 16 A.R. 397, referred to.]—See COMPANY, 2.

CASES—(Continued).

Bonanza Creek Gold Mining Co. v. The King, [1916] 1 A.C. 566, followed.]—See COMPANY, 4.

Boyd v. Richards (1913), 29 O.L.R. 119, distinguished.]—See MORTGAGE, 1.

British Columbia Electric R.W. Co. Limited v. Vancouver Victoria and Eastern R.W. Co., [1914] A.C. 1067, distinguished.]—See EXECUTION.

Everett v. Everett (1877), 7 Ch. D. 428, 433, 434, specially referred to.]—See WILL, 3.

Fraser v. Mutchmor (1904), 8 O.L.R. 613, followed.]—See VENDOR AND PURCHASER.

Fraser v. Ryan (1897), 24 A.R. 441, distinguished.]—See MORTGAGE, 1.

Friendly v. Carter (1881), 9 P.R. 41, approved.]—See TRIAL.

Geddes and Cochrane, Re (1901), 2 O.L.R. 145, distinguished.]—See ARBITRATION AND AWARD.

Gibson v. Le Temps Publication Co. (1904), 8 O.L.R. 707, 708, approved.]—See HUSBAND AND WIFE, 5.

Goff, Re (1914), 111 L.T.R. 34, followed.]—See GIFT.

Goldrei Foucar and Son v. Sinclair (1917), 34 Times L.R. 74, [1918] 1 K.B. 180, followed.]—See FRAUD AND MISREPRESENTATION.

Gordon v. Holland (1913), 82 L.J.P.C. 81, specially referred to.]—See HUSBAND AND WIFE, 5.

Grand Trunk R.W. Co. v. City of Toronto (1904-5), 4 O.W.R. 450, 6 O.W.R. 27, distinguished.]—See EXECUTION.

Greenock Corporation v. Caledonian R.W. Co., [1917] A.C. 556, followed.]—See WATER.

CASES—(Continued).

British Union and National Insurance Co. v. Rawson, [1916] 2 Ch. 476, followed.]—See INDEMNITY.

Cook v. Deeks, [1916] 1 A.C. 554, explained and applied.]—See COMPANY, 2.

Cooney v. Sheppard (1895), 23 A.R. 4, applied and followed.]—See HUSBAND AND WIFE, 4.

Crawford v. Bathurst Land and Development Co. Limited (1916), 37 O.L.R. 611, affirmed.]—See COMPANY, 3.

Crawshay v. Collins (1808), 15 Ves. 218, followed.]—See HUSBAND AND WIFE, 5.

Davey v. Christoff (1916), 36 O.L.R. 123, distinguished.]—See LANDLORD AND TENANT, 2.

Derry v. Peek (1889), 14 App. Cas. 337, followed.]—See FRAUD AND MISREPRESENTATION.

Domestic Telegraph Co. v. Newark (1887), 49 N.J. Law 344, 346, approved.]—See TELEPHONE COMPANY.

Dominion Cotton Mills Co. v. Amyot, [1912] A.C. 546, referred to.]—See COMPANY, 2.

Doner v. Western Canada Flour Mills Co. Limited (1917), 41 O.L.R. 503, distinguished.]—See CONTRACT, 1, 2.

Eaton v. Eaton (1870), L.R. 2 P. & D. 51, distinguished.]—See HUSBAND AND WIFE, 2.

Hamilton Gas and Light Co. and United Gas and Fuel Co. v. Gest (1916), 37 O.L.R. 132, referred to.]—See COMPANY, 2.

Hardoon v. Belilios, [1901] A.C. 118, applied.]—See EXECUTORS AND ADMINISTRATORS, 2.

Harris v. London and Lancashire Fire Insurance Co. (1866),

CASES—(Continued).

10 L.C. Jur. 268, discussed.]—
See INSURANCE, 1.

Harrison v. Harrison (1917),
41 O.L.R. 195, affirmed.]—See
HUSBAND AND WIFE, 1.

Hatton v. Bertram (1887), 13
O.R. 766, referred to.]—See
WILL, 5.

Helsby, In re (1893), 68 L.J.
Q.B. 261, applied and followed.
See HUSBAND AND WIFE, 4.

Hill v. Broadbent (1898), 25
A.R. 159, distinguished.]—See
VENDOR AND PURCHASER.

Howe v. Smith (1884), 27 Ch.
D. 89, specially referred to.]—See
MORTGAGE, 1.

Hughes v. Oxenham, [1913] 1
Ch. 254, referred to.]—See WRIT
OF SUMMONS, 2.

Hutton v. West Cork R.W. Co.
(1883), 23 Ch. D. 654, referred
to.]—See COMPANY, 2.

Ibrahim v. The King, [1914]
A.C. 599, followed.]—See CRIM-
INAL LAW, 2.

Ingram, Re (1918), 42 O.L.R.
95, followed.]—See WILL, 5.

Innes, In re, [1910] 1 Ch. 188,
considered.]—See GIFT.

Johnson v. Crook (1879), 12
Ch. D. 639, followed.]—See WILL
6.

Jones v. Gibbons (1853), 8 Ex.
920, referred to.]—See CONTRACT,
1.

Kavanaugh v. Cassidy (1903),
5 O.L.R. 614, distinguished.]—
See COSTS, 1.

Kirby v. Bangs (1900), 27 A.R.
17, 29, followed.]—See WILL, 6.

Knapp v. Knapp (1887), 12
P.R. 105, distinguished.]—See
HUSBAND AND WIFE, 2.

Knox v. Gye (1872), L.R. 5

CASES—(Continued).

H.L. 656, specially referred to.]—
See HUSBAND AND WIFE, 5.

Laporte v. Cosstick (1874), 23
W.R. 131, applied and followed.]
—See HUSBAND AND WIFE, 4.

*Liverpool Mortgage Insurance
Co.'s Case*, [1914] 2 Ch. 617,
followed.]—See INDEMNITY.

*Ludlam-Ainslie Lumber Co. v.
Fallis* (1909), 19 O.L.R. 419,
applied.]—See MECHANICS'
LIENS.

Lyle v. Richards (1866), L.R.
1 H.L. 222, followed.]—See VEN-
DOR AND PURCHASER.

*Mackenzie v. Maple Mountain
Mining Co.* (1909), 20 O.L.R.
615, 621, approved.]—See COM-
PANY, 1.

McNish v. Munro (1875), 25
U.C.C.P. 290, distinguished.]—
See VENDOR AND PURCHASER.

*McTavish v. Lannin and Ait-
chison* (1917), 39 O.L.R. 445,
referred to.]—See COSTS, 1.

*Makin v. Attorney-General for
New South Wales*, [1894] A.C. 57,
followed.]—See ONTARIO TEM-
PERANCE ACT, 2.

Marriott v. Chamberlain (1886),
17 Q.B.D. 154, followed.]—See
LIBEL.

Mason v. Town of Peterborough
(1893), 20 A.R. 683, 685, 686, re-
ferred to.]—See EXECUTORS AND
ADMINISTRATORS, 1.

*Massey-Harris Co. v. De Laval
Separator Co.* (1906), 11 O.L.R.
227, 591, approved.]—See LIBEL.

Middleton v. Spicer (1783), 1
Bro. C.C. 201, followed.]—See
WILL, 4.

*Mills v. Armstrong, The Ber-
nina* (1888), 13 App. Cas. 1, fol-
lowed.]—See NEGLIGENCE, 1.

CASES—(Continued).

Molling and Co. v. Dean and Son Limited (1901), 18 Times L.R. 217, followed.]—See SALE OF GOODS.

Morrison v. Morrison (1885), 10 O.R. 303, referred to.]—See WILL, 5.

Nelson (James) & Sons Limited v. Nelson Line Liverpool Limited, [1906] 2 K.B. 217, explained and distinguished.]—See COSTS, 2.

Nitedals Taendstikfabrik v. Bruster, [1906] 2 Ch. 671, referred to.]—See COMPANY, 2.

North Eastern R.W. Co. v. Wanless (1874), L.R. 7 H.L. 12, followed.]—See RAILWAY.

Noyes v. Crawley (1878), 10 Ch. D. 31, specially referred to.]—See HUSBAND AND WIFE, 5.

Okura & Co. v. Forsbacka Jernverks Aktiebolag, [1914] 1 K.B. 715, distinguished.]—See WRIT OF SUMMONS, 1.

Pacific Coast Syndicate Limited, In re, [1913] 2 Ch. 26, followed.]—See COMPANY, 5.

Palmer v. Goodwin (1862), 13 Ir. Ch. R. 171, referred to.]—See COMPANY, 2.

Portal and Lamb, In re (1885), 30 Ch. D. 50, referred to.]—See WILL, 5.

Poulin and Village of L'Orignal, Re (1918), 42 O.L.R. 6, reversed.]—See MUNICIPAL CORPORATIONS, 2.

Rex v. Purdy (1917), 41 O.L.R. 49, distinguished.]—See ONTARIO TEMPERANCE ACT, 1.

Riche v. Ashbury Railway Carriage and Iron Co. (1874), L.R. 9 Ex. 224, followed.]—See COMPANY, 4.

CASES—(Continued).

Robinson v. Robinson (1828), 2 Lee Eccl. R. 593 (appx.), applied and followed.]—See HUSBAND AND WIFE, 3.

Salomons v. Pender (1865), 3 H. & C. 639, referred to.]—See COMPANY, 2.

Sharkey v. Yorkshire Insurance Co. (1916), 37 O.L.R. 344, *dictum* of RIDDELL, J., at p. 352, not assented to.]—See INSURANCE, 2.

Simon, In re, [1909] 1 K.B. 201, applied and followed.]—See HUSBAND AND WIFE, 4.

Smith v. Marrable (1843), 11 M. & W. 5, distinguished.]—See LANDLORD AND TENANT, 2.

Smith v. South Eastern R.W. Co., [1896] 1 Q.B. 178, followed.]—See RAILWAY.

Soules v. Soules (1851), 3 Gr. 113, applied and followed.]—See HUSBAND AND WIFE, 3.

Steedman v. Drinkle, [1916] 1 A.C. 275, distinguished.]—See MORTGAGE, 1.

Stickney v. Keeble, [1915] A.C. 386, specially referred to.]—See MORTGAGE, 1.

Strong v. Bird (1874), L.R. 18 Eq. 315.]—See GIFT.

Superior Copper Co. Limited v. Perry (1917), 40 O.L.R. 467, reversed.]—See WRIT OF SUMMONS, 2.

Sutton's Hospital Case (1613), 10 Co. Rep. 1a, explained and distinguished.]—See COMPANY, 4.

Swaizie v. Swaizie (1899), 31 O.R. 324, followed.]—See INSURANCE, 5.

Thorne v. Kerr (1855), 2 K. & J. 54, followed.]—See EXECUTORS AND ADMINISTRATORS, 2.

Toronto, City of, v. Grand

CASES—(Continued).

Trunk R.W. Co. (1906), 37 S.C.R. 232, distinguished.]—See EXECUTION.

Toronto R.W. Co. v. City of Toronto (1916), 53 S.C.R. 222, distinguished.]—See EXECUTION.

Tyrrell v. Bank of London (1862), 10 H.L.C. 26, referred to.]—See COMPANY, 2.

Van Diemen's Land Co. v. Marine Board of Table Cape, [1906] A.C. 92, followed.]—See VENDOR AND PURCHASER.

Vansickle v. Vansickle (1884), 9 A.R. 352, 354, specially referred to.]—See WILL, 3.

Walker v. Gurney-Tilden Co. (1899), 19 P.R. 12, explained and distinguished.]—See COSTS, 2.

Waterpark v. Fennell (1859), 7 H.L.C. 650, followed.]—See VENDOR AND PURCHASER.

Wenborn & Co., In re, [1905] 1 Ch. 413, followed.]—See COMPANY, 5.

Whitling v. Fleming (1908), 16 O.L.R. 263, approved.]—See SLANDER, 2.

Williams and Ancient Order of United Workmen, In re (1907), 14 O.L.R. 482, followed.]—See INSURANCE, 5.

Williams v. Moss' Empires Limited, [1915] 3 Q.B. 272, followed.]—See CONTRACT, 1.

Willis, In re, [1911] 2 Ch. 563, referred to.]—See WILL, 5.

Willis v. Watney (1881), 45 L.T.R. 739, followed.]—See VENDOR AND PURCHASER.

Wilson v. Finch Hatton (1877), 2 Ex. D. 336, distinguished.]—See LANDLORD AND TENANT, 2.

Winfield v. Fowlie (1887), 14 O.R. 102, followed.]—See VENDOR AND PURCHASER.

CASES—(Continued).

Zierenberg v. Labouchere, [1893] 2 Q.B. 183, followed.]—See SLANDER, 1.

CAUTION.

See CRIMINAL LAW, 2—WILL, 7.

CEMETERY.

See WILL, 9.

CHANGE OF BENEFICIARY.

See INSURANCE, 3, 5.

CHARGE ON LAND.

See WILL, 2.

CHARITY.

See WILL, 1, 4.

CHARTER.

See COMPANY, 4—TELEPHONE COMPANY—WATER.

CHATTEL MORTGAGE.

Action by Division Court Judgment Creditors of Mortgagor to Set aside—Mortgage Void under Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135—Division Court Judgment Satisfied after Commencement of Action—Trial of Action to Determine Question of Costs—Failure to Issue Execution upon Division Court Judgment before Action—Costs of Action and of Appeal—Procedure—Class Action—Style of Cause—Amendment—Action Brought on Behalf of all Creditors—Locus Standi of Plaintiffs—Sec. 2 (b) of Act—Existence of other Creditors.]—The plaintiffs, being judgment creditors of the defendant company by virtue of a judgment recovered in a Division Court,

CHAT. MTGE.—(Continued).

brought this action, in the Supreme Court of Ontario, to have it declared that a certain chattel mortgage made by the defendant company to the defendant T. was void as against the plaintiffs and other creditors of the defendant company. When the action was commenced, execution had not been issued upon the plaintiffs' judgment. Before this action came down to trial, the amount of the plaintiffs' judgment had been paid to them; and, so far as they were concerned, only the costs of this action were in question. The trial Judge (LATCHFORD, J.) determined that the chattel mortgage was void against creditors of the mortgagor, and ordered the defendants to pay the plaintiffs' costs of the action. The defendants appealed from this judgment:—*Held*, that the chattel mortgage rightly found to be void under the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135—the transaction between the defendants was in fact an endorsement by the defendant T. of the defendant company's promissory note, whereas the chattel mortgage was in the form prescribed for a direct loan.—*Held*, also, that the trial Judge's award of costs to the plaintiffs could not be interfered with, but that the plaintiffs should have no costs of the appeal. *Barchard & Co. Limited v. Nipissing Coca Cola Bottle Works Limited*, 196.

See ASSIGNMENTS AND PREFERENCES.

CLASS ACTION.

See CHATTEL MORTGAGE.

COLLATERAL AGREEMENT.

See CONTRACT, 3—INDEMNITY.

COLLISION.

See NEGLIGENCE.

COMMISSIONS.

See COMPANY, 3—PRINCIPAL AND AGENT.

COMMITTAL.

See DIVISION COURTS, 1.

COMPANY.

Director Acting as Travelling Salesman for Trade Publication—Remuneration for Services—Absence of By-law—Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 92—Misconduct of Travelling Salesman in Soliciting Employer's Customers for Similar Publication of his own—Right to Remuneration notwithstanding—Finding of Trial Judge as to Misconduct—Appeal—Divided Court—Pirating Publication of Former Employer—Attempt to Entice away Servants—Finding of Fact—Appeal—Injunction—Scope of.]—The defendant L. was in the service of the plaintiffs, an incorporated company, publishers of a law-list, from the time of the company's inception until the summer of 1916. He was employed as a travelling salesman, and was also a director of the company. About the 1st July, 1916, L. started an opposition business, in which he was joined by the defendant P., who had also been employed by the company from

COMPANY—(Continued).

1913 until the summer of 1916, and was also a director. Shortly afterwards, they formed the defendant company, and began the publishing of a law-list similar to the plaintiffs'. The plaintiffs, by the first action, sought an injunction restraining the defendants from pirating the plaintiffs' book, soliciting their customers, etc. In the second action, the plaintiffs sought to recover from L. moneys received by him from and for the plaintiffs; these sums L. claimed as salary, but the plaintiffs set up that he was false to his charge, and so was not entitled to any wages, and also that, being a director, he was not entitled to receive anything from the plaintiffs without a by-law authorising the payment, and there was no by-law:—*Held*, in the second action, that, although there must be a by-law, and approval thereof by the shareholders, before a director can be entitled to pay as such (sec. 92 of the Ontario Companies Act, R.S.O. 1914, ch. 178), there is no reason why one who happens to be a director should not serve the company in another capacity, and receive reasonable remuneration therefor, without a by-law authorising the payment; *aliter*, if the services are such that only a director can perform them.—Review of the authorities.—The expression of the object of the enactment in *Mackenzie v. Maple Mountain Mining Co.* (1909), 20 O.L.R. 615, at p. 621, approved.—The defendant L. was therefore *held* entitled to his salary as

COMPANY—(Continued).

travelling salesman, until the 1st July, 1916, with the exception of one-half of his salary for June, 1916.—The trial Judge found that the misconduct of the defendant L. had disentitled him to remuneration for his services; but in the appellate Court it was *held*, that, if L. was guilty of misconduct in June, 1916, by soliciting customers for his new venture while still in the service of the plaintiffs, that misconduct did not disentitle him to previously earned wages.—Review of the authorities.—Upon the question of fact whether L. had been guilty of misconduct in June, there was an equal division of opinion in the appellate Court; and, in the result, it was adjudged that the plaintiffs should recover \$100 only in respect of their claim to the moneys retained by L., with Division Court costs; L. to have the costs of the appeal, and the excess of his costs of the action, upon the Supreme Court scale, to be set off (Rule 649).—In the first action, the trial Judge found that use had been made of the plaintiffs' material in the preparation of the defendants' production, and made other findings in favour of the plaintiffs. In the appellate Court there was, in this action also, an equal division of opinion upon the question whether the evidence sustained the findings of fact of the trial Judge; and, in the result, the judgment of the trial Judge was affirmed in the main, with some modifications which narrowed the operation of

COMPANY—(Continued).

the injunction. *Canada Bonded Attorney and Legal Directory Limited v. Leonard-Parmiter Limited, Canada Bonded Attorney and Legal Directory Limited v. G. F. Leonard*, 141.

2. *Directors—Services as Managers—Salaries—By-law—Approval of Majority of Shareholders—Rights of Minority—Duties of Directors as Servants or Agents of Company—Contract for Payment—Contracting Company—Destruction of Future Prospects—Directors Taking Contracts for themselves—Unfaithfulness—Inseparable Duties—Fraud—Oppression—Return of Sums Paid as Salaries—Invalidity of By-law—Gratuities.*—The capital stock of a contracting company was \$200,000, divided into 2,000 shares; the plaintiff owned 500 shares, the defendants H. and D. each 500 shares, and the third defendant and his wife 500 shares between them; and the plaintiff and defendants were the directors. The active management of the affairs of the company, the procuring of railway construction contracts and the carrying out of the work thereunder, was in the hands of the defendants H. and D.; and large profits accrued from the operations of the company, begun in 1905. In 1909, the defendants H. and D. became dissatisfied, and informed the plaintiff of their complaint, viz., that, while they did all the work and earned all the profits, the profits were shared by the plaintiff. At a meeting of the

COMPANY—(Continued).

directors, early in January, 1910, at which the plaintiff was present, "it was decided," as the minutes read, "that the officers actively engaged in the management of the company should receive a salary to be settled on hereafter, this salary to date from May 1st, 1909." Nothing was done (at any rate for some years) in pursuance of this decision; the work went on as before until, in July or August, 1911, the defendants H. and D. determined to take such future contracts as they could obtain for their own benefit and not for the company. This determination was not announced to the plaintiff; but, in December, 1911, H. and D. intimated to the plaintiff that there must be a severance; and, in March or April, 1912, the L.S. contract was taken by H. and D. for themselves only; and they then notified the plaintiff of their intention to take all future contracts in their own names and for their own benefit. In *Cook v. Deeks*, [1916] 1 A.C. 554, it was declared by the Judicial Committee of the Privy Council, on the 29th February, 1916, that H. and D. were trustees for the company of the profits obtained from the L.S. contract. On the 25th March, 1916, a by-law was passed by the directors of the company (in the face of the opposition of the plaintiff) authorising the payment out of the funds of the company of salaries to H. and D., at the rate of \$25,000 a year each, for the period commencing on

COMPANY—(Continued).

the 1st May, 1909, and ending on the 23rd February, 1912; this by-law was confirmed at a shareholders' meeting held on the 10th April, 1916, all the shareholders, except the plaintiff, being present; and the sum of \$70,461.43 was paid to H. and a like sum to D.:—*Held* (MEREDITH, C.J.C.P., dissenting), that the by-law was ineffective, and the amounts paid to H. and D. should be repaid to the company.—*Cook v. Deeks*, *supra*, explained and applied.—The following cases were also referred to: *Nitedals Taendstikfabrik v. Bruster*, [1906] 2 Ch. 671; *Palmer v. Goodwin* (1862), 13 Ir. Ch. R. 171; *Re Bolt and Iron Co.*, *Livingstone's Case* (1887-88), 14 O.R. 211, 16 A.R. 397; *Hutton v. West Cork R.W. Co.* (1883), 23 Ch. D. 654; *Hamilton Gas and Light Co. and United Gas and Fuel Co. v. Gest* (1916), 37 O.L.R. 132; *Tyrrell v. Bank of London* (1862), 10 H.L.C. 26; *Salomons v. Pender* (1865), 3 H. & C. 639; *Dominion Cotton Mills Co. v. Amyot*, [1912] A.C. 546.—The judgment of MASTEN, J., reversed. *Cook v. Hinds*, 273.

3. *Directors — Trustees — Promoters—Breaches of Trust—Sums Paid to Trustees out of Price Paid by Company to Promoter and Director for Land—Right of Shareholder to Compel Repayment to Company—Sum Paid by Officers of Company to Director as Commission upon Resale of Land—Right to Compel Repayment—Liability of Directors Authorising or Concerned in Improper Pay-*

COMPANY—(Continued).

ment—By-laws of Shareholders Ratifying Payments — Fraud — Impairment of Capital — Prospectus Clauses of Companies Act, R.S.O. 1914, ch. 178, secs. 99 et seq.—The judgment of MASTEN, J., 37 O.L.R. 611, was affirmed by a Divisional Court of the Appellate Division.—Upon the question of the liability of two of the defendants, directors of the defendant company, to repay to the defendant company a commission found to have been improperly paid to the defendant D., also a director, the Court was divided.—As to the sums paid to the defendants F. and D. for their services as promoters, by W., the vendor to the syndicate, out of the money which he received as the difference between the price at which he bought the land and that at which he sold to the syndicate, it was *held, per Curiam*, that these sums were secret profits obtained by those who were really trustees for the company, and thus liable to account to the company for what they had received. *Crawford v. Bathurst Land and Development Co. Limited*, 256.

4. *Powers — Promissory Note — Contract — Incorporation by Letters Patent Issued by Provincial Secretary under Ontario Companies Act, R.S.O. 1914, ch. 178 — Specified Objects of Incorporation—Power to Contract for other Purposes—Sec. 210 of Act, Added by 6 Geo. V. ch. 35, sec. 6—General Capacity of Corporations Created by Charter—Interpreta-*

COMPANY—(Continued).

tion of Added Section—Authority of President and Manager of Company to Enter into Contract and Make Promissory Note—Executed Contract under Seal—Sec. 23 (1) (a), (i), of Act.—The defendant company was incorporated by letters patent issued in 1914, signed by the Provincial Secretary and sealed with his official seal, under the authority of the Ontario Companies Act, R.S.O. 1914, ch. 178. The objects of incorporation set forth in the letters were: to acquire lands and buildings, improve and alter them, sell, lease, exchange or mortgage them; to erect buildings and to deal in lands and building material, and generally to do all such things as were incidental or conducive to the attainment of these objects; to carry on business as brokers and agents, and to acquire, purchase, and take over a real estate, insurance agency, and building business carried on by B. & Co. This action was brought to recover the amount of a promissory note made by the defendants—the defendant company's signature being made thus: "Burks Limited, per A. W. Burk, Mgr." This note was a renewal of one given on account of the purchase-price of machinery and patent rights for the manufacture of machines for pressing clothes. The contract of purchase was executed by the signature of the president and manager and the affixing of the company's corporate seal. The defences of the company were, that it did not make the note sued upon, and

COMPANY—(Continued).

that it had no authority or power to do so under its charter; and it was held (MEREDITH, C.J.C.P., dissenting), that neither of these defences could prevail. — *Per LENNOX, J., and FERGUSON, J.A.*: —By virtue of the provisions of sec. 6 of the Ontario Companies Amendment Act, 1916, 6 Geo. V. ch. 35, adding sec. 210 to the Ontario Companies Act, R.S.O. 1914, ch. 178, the company was endowed with all the capacity which a corporation created by charter had at common law—that is, almost unlimited capacity to contract; statements in the letters patent defining the objects of incorporation did not take away that capacity; and even express restrictions in the charter did not take it away, but should be treated as a declaration of the Crown's pleasure in reference to the purposes beyond which the capacity of the corporation was not to be exercised, a breach whereof gave the Crown a right to annul the charter.—*Riche v. Ashbury Railway Carriage and Iron Co.* (1874), L.R. 9 Ex. 224, and *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566, followed.—The contract being under seal and being executed by receipt of the articles purchased, the plaintiff not having acted in bad faith or with notice or knowledge that the contract was not within the objects of incorporation enumerated in the letters patent, and the president and manager having apparent authority to execute the contract and make the note sued

COMPANY—(Continued).

on, he had, so far as the plaintiff was concerned, actual authority to do so.—*Per* ROSE, J. Having regard to the company's power, under the letters patent of incorporation, to acquire lands and buildings, and to the incidental powers conferred by the Companies Act, sec. 23, sub-sec. (1), clauses (a) and (i), the contract of the company was not beyond the powers which it had unaided by the recent amendment.—*Per* MEREDITH, C.J.C.P. The transaction was beyond the powers of the company. The amending Act had not the effect attributed to it by the majority of the Court.—Review of the authorities.—The *Bonanza Creek* case, *supra*, and *Sutton's Hospital Case* (1613), 10 Co. Rep. 1 a., explained and distinguished.—*Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653, specially referred to.—Upon the facts, the note was not the note of the company. *Edwards v. Blackmore*, 105.

5. *Winding-up — Action against Company Commenced before Winding-up Order—Liquidator Authorised to Continue Defence in Name of Company and Plaintiff to Continue Action against Company—Addition of Liquidator as Party Defendant—Personal Liability for Costs—Liability of Assets of Company.*—An action brought in the Supreme Court of Ontario against an incorporated company, to set aside as fraudulent and preferential a chattel mortgage made to the

COMPANY—(Continued).

company, was at issue when an order was made by a Quebec Court for the winding-up of the company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, and a liquidator was appointed. By orders made by the Quebec Court, the liquidator was allowed to intervene and continue the defence of the action, and the plaintiff was allowed to continue the action against the company in liquidation:—*Held*, that the liquidator of the defendant company was not a necessary or proper party to the action; and an order made by a Master, upon the application of the plaintiff, adding the liquidator as a defendant, was set aside.—When a company is in process of being wound up, the liquidator, if unsuccessful in litigation which he is carrying on, will pay the costs out of the assets of the company, and these costs have priority over the liquidator's costs of the winding-up. The estate of the company is in truth the party defendant, and is saddled with the burden of the costs awarded.—*In re Pacific Coast Syndicate Limited*, [1913] 2 Ch. 26, and *In re Wenborn & Co.*, [1905] 1 Ch. 413, followed.—When it is deemed proper that the right of the company should be determined in the pending litigation rather than in the liquidation, the liquidator may sue or defend either in his own name or in the name of the company; if he elects to proceed in his own name, he makes himself personally liable for costs; but no such liability should be

COMPANY—(Continued).

imposed upon him, for he is an officer of the Court, and is only discharging his official duty. *Cole v. British-Canadian Fur and Trading Co.*, 587.

6. *Winding-up — Custody of Goods in Possession of Sheriff under Execution against Goods of Company—Claims of Alleged Purchaser — Right of Liquidator — Winding-up Act, R.S.C. 1906, ch. 144, secs. 33, 84, 133.*—At the time when an order was made, under the Winding-up Act, R.S.C. 1906, ch. 144, for the winding-up of a company, certain goods, which were admittedly at one time the property of the company, were in the custody of the sheriff, in the building occupied by the company and in which its business had been carried on, under a writ of *fi. fa.* against the goods and lands of the company. The goods were claimed by the appellants, two men who asserted that they had bought the goods from the company:—*Held*, that the winding-up order superseded the execution, and that the liquidator should have the custody of the goods, pending an inquiry into the validity of the appellant's claims, and without impairing those claims. — Sections 33, 84, and 133 of the Act referred to. *Re Ideal Foundry and Hardware Co.*, 411.

See CONTRACT, 3—FRAUD AND MISREPRESENTATION — TELEPHONE COMPANY — WATER — WRIT OF SUMMONS, 1, 2.

COMPENSATION.

See TRUSTS AND TRUSTEES.

CONDITION.

See SALE OF GOODS.

CONDITIONAL APPEARANCE.

See WRIT OF SUMMONS, 2.

CONSENT JUDGMENT.

See INJUNCTION.

CONSIDERATION.

See HUSBAND AND WIFE, 6.

CONSPIRACY.

See CRIMINAL LAW, 1.

CONSTITUTIONAL LAW.

See DIVISION COURTS, 1.

CONSTRUCTIVE TRUSTEE.

See HUSBAND AND WIFE, 5.

CONTEMPT OF COURT.

See DIVISION COURTS, 1.

CONTRACT.

1. *Sale of Flour of one Kind—Terms—Delivery “as Required” —Weekly Deliveries—Construction of Written Agreement — Variation — Evidence — Statute of Frauds—Surrounding Circumstances—Right to Require Delivery —Time of Essence—Agreement to Postpone not in Writing—Loss of Right—Abandonment—Inference from Silence.*—The plaintiff, a baker, sued for damages for breach of an agreement made with him by the defendant, a dealer in flour, for the sale of 1,560 bags of flour (all of one kind) at a price agreed upon. There was a memorandum in writing, dated the 14th October, 1915, signed by both parties, in which the number of bags and

CONTRACT—(Continued).

the price per bag were stated, and the terms of payment and delivery as follows: "Terms cash." "Delivery as required—30 bags week is to be taken out by November 1st, 1916." Up to the middle of October, 1916, the plaintiff had asked for and had received only 1,077 bags, leaving 483 undelivered. About the middle of October, the plaintiff requested the defendant to deliver the 483 bags. The defendant refused, taking the position that, the plaintiff not having from time to time asked for 30 bags a week, he, the defendant, had considered that the plaintiff had abandoned his right to the flour not asked for, and he, the defendant, had sold the bags which had not been asked for, and was not bound to make delivery to the plaintiff. The plaintiff's claim was based on the refusal to deliver the 483 bags:—*Held*, that oral evidence was not, by reason of the Statute of Frauds, admissible to shew a variation of the written contract; but evidence of the circumstances surrounding the making of the contract, the position of the parties, and their subsequent conduct, might be looked at to ascertain the true intent and meaning of the words used in the contract. — *Williams v. Moss' Empires Limited*, [1915] 3 Q.B. 272, followed.—Upon the wording of the contract, read in the light of the surrounding circumstances, the time fixed for delivery was of the essence of the contract and of the essence of the

CONTRACT—(Continued).

plaintiff's right to require delivery; that, if there was an agreement to postpone, it was ineffective because not in writing; that the plaintiff had not established that he was ready and willing to accept and pay for the flour in the manner and at the time provided for in the contract; that it was not necessary for the defendant, in default of the plaintiff's request, to tender 30 bags per week; and, therefore, the rights of the parties terminated as to each 30 bags on the expiration of the week in which they should have been delivered; or that, at any rate, the proper inference from the contract and the evidence as to the position and conduct of the parties and the surrounding circumstances was that their rights were mutually abandoned.—*Doner v. Western Canada Flour Mills Co. Limited* (1917), 41 O.L.R. 503, distinguished.—*Per* HODGINS, J.A., and LATCHFORD, J.:—The systematic and regular request, week by week, for smaller lots than 30 bags, enabled an inference of abandonment to be drawn in regard to the difference. Such a conclusion would not inevitably follow from mere silence.—The relative rights of vendor and vendee where the delivery is to be "as required" considered, and *Jones v. Gibbons* (1853), 8 Ex. 920, referred to. *Sierichs v. Hughes*, 608.

2. *Sale of Flour of two Kinds—Delivery "as Required"—Weekly Deliveries—Construction of*

CONTRACT—(Continued).

Written Agreement—Variation—Forbearance—Silence—Right to Require Delivery—Time of Essence—Specification of Requirements—Abandonment.]—In the case of a contract for the sale of flour, similar to that in question in *Sierichs v. Hughes*, ante, it was held, that an action for damages for breach of the contract failed, for the reasons given in that case.—The contract in this case was for 1,000 bags of one kind of flour and 1,000 bags of another kind; and it was *à fortiori* plain that the obligation was on the plaintiff (the vendee) to specify his requirements before the defendant was called upon to make delivery.—The terms as to delivery in this contract were: "Delivered as required up to Nov. 1, 1916, 35 bags week;" and it was held, that this must be read to mean that the flour was to be delivered as required in instalments of about 35 bags per week.—There was in this case no attempt to prove any variation of the contract or request by the defendant to forbear, except in so far as that might be inferred from silence.—*Doner v. Western Canada Flour Mills Co. Limited* (1917), 41 O.L.R. 503, referred to. *Gerow v. Hughes*, 621.

3. *Sale of Land—Undertaking by Agent of Vendor-company to Resell at Profit within Specified Period—Promise not Incorporated in Agreement of Sale—Independent Collateral Agreement—Authority of Agent—Ratification by General Manager—Powers of—*

CONTRACT—(Continued).

Secret Restriction—Agreement Binding on Company—Statute of Frauds—Oral Evidence of Stipulation—Mistake—Fraud—Enforcement of Collateral Agreement—Payments under Contract of Sale after Breach of Collateral Agreement—Waiver—Amendment—Counterclaim—Damages—Set-off against Balance of Purchase-price.]—The plaintiff company sought to enforce an agreement for the purchase by the defendant of land. This agreement was procured from the defendant by G., an agent of the plaintiffs; and G. promised the defendant, that the plaintiffs would resell the lots for the defendant, at a profit:—*Held*, that the case was one of an agreement for the sale of land with an independent collateral agreement, and it was not necessary that the collateral agreement should appear in the agreement for sale.—(2) That C., general manager of the plaintiff company, had ostensible authority to make or ratify the collateral agreement, and any secret restriction of his authority would not affect the defendant, who relied upon his being the general manager.—(3) That the collateral agreement, being an agreement to sell land, not for the sale of land, was not within the Statute of Frauds.—(4) That, if the collateral agreement was within the statute, the defendant being induced to sign a written contract for the purchase of land on the faith of the performance of a collateral stipulation, oral evidence of that stipulation

CONTRACT—(Continued).

should not be excluded by reason of the statute; and the plaintiffs should not be allowed to enforce the promises made to them in the contract for purchase without being bound by their own promise.—(5) That, even if G. was in a sense acting for the defendant, the defendant was not affected by G.'s omission to include the promise to resell in the agreement of sale: if it was intended to be included, it was left out by mistake; and to allow the plaintiffs to take advantage of the omission would be a gross fraud.—(6) That the agreement to resell was, therefore, binding on the plaintiffs.—(7) That the two agreements were independent; and the defendant, by paying on the agreement of sale after there was a breach of the agreement to resell by the 1st August, 1914, had not put it out of his power to enforce the latter agreement.—(8) That the plaintiffs were entitled to judgment for the amount due under the agreement of sale, and the defendant should have leave to amend by counterclaiming upon the agreement to resell, and judgment for damages for breach of that agreement, with a set-off *pro tanto*.—(9) That the damages should be the difference between the amount the defendant should have received for the lots had the plaintiffs carried out their contract (the purchase-price plus \$200), and the value of the lots. *Canadian General Securities Co. Limited v. George*, 560.

CONTRACT—(Continued).

See COMPANY, 2, 4—FRAUD AND MISREPRESENTATION—HUSBAND AND WIFE, 1, 4, 6—INDEMNITY—INSURANCE—LANDLORD AND TENANT, 3—MECHANICS' LIENS—MORTGAGE—PRINCIPAL AND AGENT—PUBLIC HEALTH ACT—REFERENCE—SALE OF GOODS—STREET RAILWAY—TELEPHONE COMPANY—VENDOR AND PURCHASER—WRIT OF SUMMONS, 2.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE—RAILWAY.

CONVICTION.

See CRIMINAL LAW—ONTARIO TEMPERANCE ACT.

CORONER'S JURY.

See NEGLIGENCE, 1.

CORPORATION.

See COMPANY—MUNICIPAL CORPORATIONS.

COSTS.

1. *Security for Costs—Plaintiff Ordinarily Resident out of Ontario though Temporarily within—Application of Rule 373 (b)—Discretion.*—Rule 373 provides that security for costs may be ordered, (b) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario:—*Held*, that when there is shewn an actual and *bonâ fide* change of residence from without Ontario to a place within Ontario, before the cause of action accrued, the

COSTS—(Continued).

case is not within the Rule.—*Kavanaugh v. Cassidy* (1903), 5 O.L.R. 614, distinguished.—If there was a discretion, as said in *McTavish v. Lannin and Aitchison* (1917), 39 O.L.R. 445, it should be exercised, in this case, by refusing to order the plaintiff to give security. *Erickson v. McFarlane*, 32.

2. *Taxation of Costs—Action Brought by Insurer in Name of Assured—Nominal Plaintiff not Responsible for Costs to Solicitor—Right to Tax Costs against Opponent—Subrogation—Order of Judge in Chambers on Appeal from Ruling of Taxing Officer—Right of Appeal to Divisional Court.*—The plaintiff's automobile was injured by the negligence of the defendants' employees. The plaintiff was insured against injury by such an accident as that which occurred, and the insurance company adjusted and paid his loss. This action was brought by the insurance company, in the name of the plaintiff, to recover damages for the loss sustained, and in the action there was judgment for the plaintiff for \$600 and costs:—*Held*, in Chambers, that the insurance company, being called upon by the plaintiff to indemnify him, was by law subrogated to his rights against the wrongdoer; this was not an assignment of the right of action, for it was founded on tort and could not be assigned; it was the right of the insurer to resort to the Court and to assert, in the name of the assured, the assured's

COSTS—(Continued).

right of action against the wrongdoer; when the judgment was recovered, though in the name of the assured, it was the property of the insurer; the costs awarded were in the same way the costs of the insurer, though awarded in the name of the assured; and the rule that a party cannot tax, against his opponent, solicitor's fees which he is not called upon to pay, had no application.—*Walker v. Gurney-Tilden Co.* (1899), 19 P.R. 12, and *James Nelson & Sons Limited v. Nelson Line (Liverpool) Limited*, [1906] 2 K.B. 217, explained and distinguished.—*Semble*, where the insurer sues in the name of the assured, he is a nominal plaintiff, and in proper cases security for costs may be ordered; also the insurer is a person for whose benefit the action is brought, and from whom discovery may be had.—An appeal from the order in Chambers was dismissed.—No opinion was expressed as to whether there was a right of appeal without leave. *Gough v. Toronto and York Radial R.W. Co.*, 415.

3. *Taxation of Costs—Fee for Solicitor Attending Trial—Per Diem Allowance Fixed by Tariff (Item 14)—Computation of "Day"—Separate Actions Tried together—Separate Fee in Each.*—Item 14 of the tariff of costs provides that the fee allowed to a solicitor attending the trial of an action is \$20, but, "if the trial lasts more than one day, then for each additional day \$20:."—*Held*, that

COSTS—(Continued).

where the trial began at 3 p.m. on a Monday, was continued on Tuesday, and concluded before 3 p.m. on Wednesday, the allowance should be for two days only: the unit of "a day" begins at the hour when the trial begins and ends 24 hours thereafter.—*Held*, also, that where two actions are tried together, the same solicitor appearing in both, the fee of \$20 a day, fixed by the tariff, should be allowed in both actions. *Henstridge v. London Street R.W. Co.*, 41.

4. *Taxation of Costs—Motion to Stay Execution upon an Order not made in an Action—Interlocutory or Originating Motion—"Analogy thereto"—Rule 2.*—A motion to stay execution upon an order of the Dominion Board of Railway Commissioners, made a rule of the Supreme Court of Ontario, while neither an interlocutory motion in an action nor an ordinary motion upon originating notice, has such analogy (Rule 2) to the latter as to justify the taxation of the costs of it according to the provisions of the Tariff of Fees applicable to motions upon originating notices. *Re City of Toronto and Toronto R.W. Co.*, 413.

See CHATTEL MORTGAGE — COMPANY, 5 — HUSBAND AND WIFE, 3, 5—INDEMNITY—LANDLORD AND TENANT, 2—MUNICIPAL CORPORATIONS, 1—PUBLIC HEALTH ACT—SLANDER, 2.

COUNTERCLAIM.

See CONTRACT, 3.

COUNTY COURT JUDGE.

See LANDLORD AND TENANT, 3.

COURTS.

See ARBITRATION AND AWARD — DIVISION COURTS — EXECUTION—STREET RAILWAY.

COVENANT.

See INDEMNITY — LANDLORD AND TENANT, 1.

CREDITORS.

See ASSIGNMENTS AND PREFERENCES — CHATTEL MORTGAGE.

CRIMINAL LAW.

1. *Conspiracy to Defraud—Evidence of Identity of one Prisoner—Trial by Judge without Jury—Sufficiency of Evidence to Sustain Conviction.*—The defendants were tried by a County Court Judge without a jury upon a charge of conspiring to defraud the complainant. At the trial the complainant, in the witness-box, would not swear positively that the defendant H., then present in court as a prisoner in the dock, was the man or one of the men who had defrauded him, although he had identified the same man at the preliminary hearing in the police court. The complainant said: "To the best of my knowledge, he was the man. . . . There is another man here to-day, and I am undecided which it is." The County Court Judge thought the evidence of identity sufficient, and convicted the two defendants:—*Held*, that the conviction could not be disturbed, there

CRIMINAL LAW—(Continued). being some evidence to sustain it.—*Per* CLUTE and RIDDELL, JJ. (MULOCK, C.J.Ex., *contra*), that, if there had been a jury, the case could not have been withdrawn from them. *Rex v. Harvey and Taylor*, 187.

2. *Evidence — Admissions of Accused to Detectives—Absence of Caution — Voluntary Statements without Promise or Threat—Admissibility — Arrest.*] — The defendant, being suspected of stealing street-car tickets and money from his employers, a street railway company, was asked by two detectives to go with them to a police station, which he did; he was there searched, and tickets were found on him. Being asked by the detectives where he got the tickets, he voluntarily made statements which the detectives testified to upon his trial for theft. The detectives did not warn him that what he might say would be used against him. No promises were made nor threats used by the detectives. He was convicted:—*Held*, that the absence of a caution did not make the statements inadmissible.—*Ibrahim v. The King*, [1914] A.C. 599, followed.—*Held*, also, that it was immaterial whether or not the defendant was under arrest (and *semble*, *per* LATCHFORD, J., he was) when he made the statements. *Rex v. Rodney*, 645.

3. *Seditious Libel—Pleading—Indictment—Plea of “Not Guilty”—Subsequent Amendment — De-*

CRIMINAL LAW—(Continued). *murrer—Motion to Quash—Grand Jury—Particulars — Seven Distinct Publications Included in one Count—Verdict of “Guilty” in Respect of two Publications—Criminal Code, secs. 132, 133, 134, 852, 853, 855, 859, 860, 861—Discharge of Prisoner—Right of Crown to Prefer New Indictment.*] —In an indictment the offence must be described with reasonable certainty. In a count for publishing a seditious libel there must be substantial references to identify the words or locate the objectionable parts. Sections 852 and 861 of the Criminal Code considered.—An indictment for publishing a seditious libel, “to wit the matters contained in the annexed particulars,” these particulars setting out seven different pamphlets published by the defendant, is an indictment for seven offences under one count.—*Held*, that the demurrer to the indictment and the motion to quash should have been allowed; that the verdict did not make the indictment good; that the amendments should not have been made without the privity and consent of the grand jury; that the accused had been tried upon seven libels and convicted upon two, when the grand jury had found a bill upon only one, which was not known to be either of the two; and that the accused was, therefore, entitled to be discharged notwithstanding the verdict of “guilty.”—Sections 132, 133, 134, 852, 853, 855, 859, 860, and 861 of the Code considered.—*Per* CLUTE, J.:—A new trial could

CRIMINAL LAW—(*Continued*).
not be granted, there being no indictment upon which the defendant could be tried; but the Crown was not precluded from preferring a new indictment.
Rex v. Bainbridge, 203.

See **ONTARIO TEMPERANCE ACT**.

CROWN.

See **WATER—WILL**, 4.

CUSTODY OF ASSETS.

See **COMPANY**, 6.

DAM.

See **WATER**.

DAMAGES.

See **CONTRACT**, 3—**EXECUTORS AND ADMINISTRATORS**, 1—**FRAUD AND MISREPRESENTATION**—**INDEMNITY**—**LIBEL**—**MECHANICS' LIENS**—**SALE OF GOODS**—**SLANDER**, 2—**STREET RAILWAY**, 2—**WATER**.

DEATH.

See **EXECUTORS AND ADMINISTRATORS**, 1—**GIFT**—**HUSBAND AND WIFE**, 3—**INSURANCE**, 2-5—**NEGLIGENCE**, 1.

DECEIT.

See **INDEMNITY**.

DEED.

See **INDEMNITY**.

DEFAMATION.

See **LIBEL—SLANDER**.

DEMURRER.

See **CRIMINAL LAW**, 3.

DERIVATIVE MORTGAGE.

See **MORTGAGE**, 2.

DETECTIVES.

See **CRIMINAL LAW**, 2.

DEVASTAVIT.

See **EXECUTORS AND ADMINISTRATORS**, 2.

DEVISE.

See **WILL**.

DEVOLUTION OF ESTATES ACT.

See **WILL**, 7.

DIRECTORS.

See **COMPANY**, 1, 2, 3.

DISCOVERY.

Examination of Plaintiff Residing Abroad—Place for Examination—Rule 328—“Just and Convenient.”—One of the plaintiffs, in an action brought in the Supreme Court of Ontario, resided in New York, and an order was made, under Rule 328, requiring him to attend in Toronto for examination for discovery at the instance of the defendants. On appeal the order was varied so as to provide for the examination taking place in New York.—Ordinarily the place of residence of the person to be examined is the proper place for his examination; in this case no special circumstances were suggested; and it seemed “just and convenient” (Rule 328) that the examination should take place in New York.
Duell v. Oxford Knitting Co., 408.

See **LIBEL—SLANDER**, 1.

DISCRETION.

See COSTS, 1—WILL, 6.

DISTRIBUTION OF ESTATES.

See EXECUTORS AND ADMINISTRATORS, 2.

DIVISION COURTS.

1. *Jurisdiction over Indian—Order for Committal under Judgment Debtor Procedure—Contempt of Court—Execution—Division Courts Act, secs. 190 et seq.—Indian Act, sec. 102—Exemption—Powers of Provincial Legislature—British North America Act, sec. 91(24).*—The provisions of secs. 190 et seq. of the Division Courts Act, R.S.O. 1914, ch. 63, relating to the imprisonment of debtors, are not intended to apply to Indians.—An Indian who has no property other than what is, by virtue of sec. 102 of the Indian Act, R.S.C. 1906, ch. 81, exempt from seizure under execution, cannot be committed to gaol by a Division Court Judge, after examination as a judgment debtor, even though the Judge be of opinion that the Indian has sufficient means and ability to pay the debt: the Indian Act preventing the judgment creditor from taking the assets of the Indian in execution, they cannot be reached indirectly. — There can be no contempt in withholding that which is by law exempt from seizure; and the person of an Indian—a ward of the Dominion Government and subject to the legislation of the Dominion Parliament by the British North America Act, sec. 91 (24)—can-

DIVISN. COURTS—(*Continued*), not be taken in execution under a provincial statute. *Re Caledonia Milling Co. v. Johns*, 338.

2. *Right of Appeal*—"Sum in Dispute"—*Division Courts Act, R.S.O. 1914, ch. 63, secs. 106, 125.*—In sec. 125 of the Division Courts Act, R.S.O. 1914, ch. 63, the words "sum in dispute" mean "sum in dispute in the action"—"the sum sought to be recovered" mentioned in sec. 106.—Therefore, where the plaintiff's claim in a Division Court action was for \$99.02, principal and interest due upon a promissory note, and the Judge gave judgment for the plaintiff for the amount claimed and an additional sum for interest, by way of damages, the whole amount being slightly more than \$100, it was held, that the "sum in dispute" did not exceed \$100, and an appeal did not lie under sec. 125. *Marshall v. Holliday*, 597.

See CHATTEL MORTGAGE.

DIVORCE.

See INSURANCE, 5.

DURESS.

See HUSBAND AND WIFE, 6.

ELECTORS.

See MUNICIPAL CORPORATIONS, 2, 3.

ENTICEMENT OF SERVANTS.

See COMPANY, 1.

EQUITABLE RELIEF FROM FORFEITURE.

See LANDLORD AND TENANT, 3.

ESCHEAT.

See WILL, 4.

ESTATE.

See WILL.

ESTOPPEL.

See MUNICIPAL CORPORATIONS, 1.

EVIDENCE.

See CONTRACT, 1, 2, 3—CRIMINAL LAW, 1, 2—FRAUD AND MISREPRESENTATION—GIFT—HUSBAND AND WIFE, 4, 5, 6—INSURANCE, 4—NEGLIGENCE, 1—ONTARIO TEMPERANCE ACT, 2—SLANDER, 2—VENDOR AND PURCHASER—WILL, 4.

EXAMINATION OF PARTIES.

See DISCOVERY—LIBEL.

EXECUTION.

Order of Dominion Board of Railway Commissioners Directing Payment by Railway Company to Municipal Corporation of Sum of Money Representing Part of Cost of Bridge—Dominion Railway Act, R.S.C. 1906, ch. 37, secs. 46, 56—Order Made Rule of Supreme Court of Ontario—Issue of Writ of Fi. Fa. thereon—Motion to Stay Execution—Jurisdiction of Supreme Court of Ontario—Jurisdiction of Board to Make Order—Right to Dispute—Effect of sec. 56—Sale of "Public Utility" under Execution—Power of Dominion to Adopt Machinery of Provincial Courts—Control of Provincial Courts over Orders of Board—Finality of Order of Board—Unconditional Direction for Payment—Form of Order.]—In July, 1909, an order was made by the Domin-

EXECUTION—(Continued).

ion Board of Railway Commissioners that the railway company should pay 15 per cent. of the cost of the construction of a certain bridge. This order, while final in its nature, contained no definite direction to pay; and an order was made, in November, 1917, directing the company to pay to the city corporation, which had paid the cost in the first instance, \$80,000. In September, 1909, an application was made by the railway company to the Board (under sec. 56 (3) of the Dominion Railway Act, R.S.C. 1906, ch. 37) for leave to appeal to the Supreme Court of Canada from the order of July, 1909; the Board refused leave; an application was then made (under sec. 56 (2)) to a Judge of the Supreme Court of Canada to permit an appeal; that application was also refused:—Held, that the first order of the Board became, by virtue of sec. 56 (9), final and incapable of being reviewed; and the jurisdiction of the Board to make the two orders could not now be disputed.—British Columbia Electric R.W. Co. Limited v. Vancouver Victoria and Eastern R.W. Co., [1914] A.C. 1067, and Toronto R.W. Co. v. City of Toronto (1916), 53 S.C.R. 222, distinguished.—The order of November, 1917, was made a rule of the Supreme Court of Ontario, and the city corporation caused a writ of fi. fa. to be issued out of that Court for the purpose of levying the \$80,000:—Held, that, while it might be that the sheriff could not take possession

EXECUTION—(*Continued*).
 of and sell the railway under a *fi. fa.*, that did not prevent the issue of the writ; it concerned only its execution.—*Held*, also, that sec. 46 of the Railway Act, providing procedure for making the order of the Board a rule of a provincial Court, merely gives a simple and convenient mode of enforcing the orders of the Board—the Dominion adopting the machinery provided by the Province; the Dominion may provide for the enforcement of the decrees of its Courts or Boards; and there was no reason for regarding the course adopted as incompetent. But the provincial judiciary was not thereby given any control over orders of the Board.—*Held*, lastly, that, while in one sense the order made a rule of Court was not final, it did finally and unconditionally direct payment of \$80,000, and was sufficient in form to warrant the issue of execution for that amount.—*Grand Trunk R.W. Co. v. City of Toronto* (1904-5), 4 O.W.R. 450, 6 O.W.R. 27, and, in the Supreme Court of Canada, *City of Toronto v. Grand Trunk R.W. Co.* (1906), 37 S.C.R. 232, distinguished. *Re City of Toronto and Toronto R.W. Co.*, 82.

See COMPANY, 6—COSTS, 4—
 DIVISION COURTS, 1—HUSBAND
 AND WIFE, 2, 4.

EXECUTORS AND ADMINISTRATORS.

1. *Action by Administrator to Recover Damages for Death and Funeral Expenses of Intestate—Claim not within Fatal Accidents*

EXORS. & ADMORS.—(*Contd.*).
Act—Trustee Act, R.S.O. 1914, ch. 121, sec. 41—Cause of Action.
 —Where the death of a person was occasioned, as alleged, by the negligence of the defendant, it was *held*, that an action by the administrator of the estate of that person to recover money paid for funeral expenses and “damages for the death” would not lie.—The action could not be maintained under the Fatal Accidents Act, R.S.O. 1914, ch. 151, the relatives who survived the deceased not being within the limited class mentioned in sec. 4 (1).—Nor could the action be brought by virtue of sec. 41 of the Trustee Act, R.S.O. 1914; ch. 121, which is intended to prevent the wrongdoer escaping liability by reason of the death of the person injured, and does not create a new right of action. Before that enactment, the death of a person injured from any cause put an end to the action—*Actio personalis moritur cum personâ*.—Even if that maxim is now abolished, save as to actions of libel and slander, as said in *Mason v. Town of Peterborough* (1893), 20 A.R. 683, 685, 686, the principle that, in a civil court, the death of a human being cannot be complained of as an injury, laid down in *Baker v. Bolton* (1808), 1 Camp. 493, and affirmed in *Admiralty Commissioners v. S.S. Amerika*, [1917] A.C. 38, remains untouched. *England v. Lamb*, 60.

2. *Assets of Estate of Intestate—Bank-shares Subject to “Double*

EXORS. & ADMORS.—(Contd). *Liability" Claim—Bank Act, 3 & 4 Geo. V. ch. 9, sec. 125 (D.)—Distribution of Shares among Next of Kin and of whole Estate without Providing for Liability—Devastavit—Personal Liability of Administrators—Sec. 130 of Act—Bar by Limitations Act—Personal Liability of Administrators upon Shares—Sec. 53—Liability of Assets of Intestate's Estate in Hands of Administrators—Cause of Action Arising when Call Made upon Shares—Liability of Next of Kin upon Shares Transferred and Accepted—Transfers not Recorded—Effect in Equity of Acceptance—Sec. 43—Liability of Next of Kin to Extent of Assets Received—Suspension of Enforcement.*—The liquidator of an insolvent bank sued the administrators and the next of kin of M., deceased, the holder of 14 shares, for the amount of the "double liability."—*Held*, that, when the administrators parted with the assets (by transferring them to the next of kin of M.) without providing for this liability, they were guilty of a devastavit, and so rendered themselves liable personally. Sec. 130 of the Bank Act applied.—But the Limitations Act afforded a defence to a claim for a devastavit.—(2) The administrators were not personally liable upon the shares: sec. 53 of the Bank Act.—(3) The cause of action for the "double liability" was based upon contract, and the time did not begin to run until there was a call; and so the liability of the administrators as administrators was not barred,

EXORS. & ADMORS.—(Contd). for that was the liability of the deceased and of his estate. And the liquidator should have judgment against the administrators for the amount of the calls, interest and costs, to be levied out of the goods etc. of the intestate in the hands of the administrators, if any.—*Thorne v. Kerr* (1855), 2 K. & J. 54, followed.—(4) As against the beneficiaries, the cause of action was upon the contract also; the liability upon the shares first accrued when the call was made in 1912; and the Statute of Limitations afforded no defence.—(5) The next of kin were, at the time of the liquidation, the beneficial owners of the shares, and had accepted the transfers to them, though the transfers were not recorded in the books of the bank. Section 43 of the Bank Act requires registration; but the transferees were, in equity, bound to protect the transferors, and ought to pay. Each beneficiary was, in this view, liable for the shares transferred to him.—*Hardoon v. Belilos*, [1901] A.C. 118, applied.—(6) In a wider view, each individual was liable to refund and pay to the creditor the amount due, to the extent of the assets received by such individual, which formed part of the intestate's estate. But this remedy should not be invoked until it was ascertained whether those who ought to pay could be made to pay as transferees of the shares. *Clarkson v. McLean*, 1.

See GIFT — HUSBAND AND WIFE, 5—WILL, 4, 6.

EXEMPTION.

See DIVISION COURTS, 1.

EXPROPRIATION.

See MUNICIPAL CORPORATIONS, 1—STREET RAILWAY, 2.

FATAL ACCIDENTS ACT.

See EXECUTORS AND ADMINISTRATORS, 1—NEGLIGENCE, 1.

FIRE INSURANCE.

See INSURANCE, 1.

FIXTURES.

See ASSIGNMENTS AND PREFERENCES.

FOREIGN COMPANY.

See WRIT OF SUMMONS.

FOREIGN DIVORCE.

See INSURANCE, 5.

FORFEITURE.

See LANDLORD AND TENANT, 3.

FORUM.

See ARBITRATION AND AWARD.

FRAUD AND MISREPRESENTATION.

Agreements to Purchase Land from Company—Responsibility of Agent for Reckless Statements—Evidence—Findings of Trial Judge—Rescission of Agreements—Damages—Moneys Paid by Purchasers—Judgment Previously Recovered against Vendor-company Construed as for Return of Moneys Paid upon Failure of Consideration—Rule as to Joint Tort-feasors not Applicable.]—The plaintiffs agreed to purchase from the defendants certain lots of land in Saskatchewan, and

FRAUD & MISN.—(Continued).

paid moneys to the defendant company on account of their purchases. In these actions they alleged that they had been induced to purchase by false and fraudulent representations made to them by the defendant M. and one S., an agent of the defendant company; and they claimed a declaration of the rescission of the contracts, the return of the moneys paid by them, and damages for fraud and misrepresentation. The defendant company did not defend; and, when the actions first came on for trial, the Judge directed judgment to be entered for the plaintiff in each action against the defendant company for the amount paid by each plaintiff with interest and costs, and endorsed the records with memoranda to that effect, adding, "This without prejudice to further prosecution of action against either defendant." The trial of the actions as against the defendant M. was then postponed. The actions again came on for trial, before SUTHERLAND, J., who found in favour of the plaintiffs and gave judgment against the defendant M., declaring that the contracts were rescinded, and for the recovery by the plaintiffs of the amounts paid by them, as damages resulting from the misrepresentations which he found to have been made by the defendant M.:—*Held*, on appeal, affirming the judgment of SUTHERLAND, J., that the defendant M., with the intention of inducing the plaintiffs to purchase the lots, and so

FRAUD & MISN.—*(Continued).*

that he might earn a commission on the purchase-price, recklessly and without knowing whether they were true or false, made statements, upon which the plaintiffs acted; and, as the statements turned out to be false, M. was responsible to the same extent as if he had asserted what he knew to be untrue.—*Derry v. Peek* (1889), 14 App. Cas. 337, followed.—*Held*, also, that the judgment against the defendant company did not preclude the prosecution of the action against the defendant M.: that judgment should not be construed as having been pronounced on the claim for damages for deceit, but on the claim for a return of money received on a failure of consideration. — *Goldrei Foucar and Son v. Sinclair* (1917), 34 Times L.R. 74, [1918] 1 K.B. 180, followed. *Yost v. International Securities Co. Limited and MacPherson, Dannecker v. International Securities Co. Limited and MacPherson*, 572.

See COMPANY, 2, 3—CONTRACT,
3—SALE OF GOODS.

FUNERAL EXPENSES.

See EXECUTORS AND ADMINISTRATORS, 1.

FURNISHED APARTMENTS.

See LANDLORD AND TENANT, 2.

GIFT.

Parent and Child—Construction of Documents—Gift or Loan—Death of Parent (Donor)—Duty of Executors—Intention of Parent—Evidence of, from Documents.]

GIFT—*(Continued).*

—On the 8th July, 1913, the testatrix lent her daughter a sum of money; and on that day two documents were executed. By the first, signed by the daughter, she acknowledged the receipt of the sum “as a loan to be used as a first payment upon the house . . . I also hereby agree to pay you interest . . . half-yearly, and further agree that the said loan is to be a lien upon my equity in the said house, until paid or otherwise satisfied, but repayment of said loan is not to be demanded of me so long as I pay interest, and provide for the aforesaid lien, or give equivalent security satisfactory to you.” By the second document, signed by the testatrix, she declared that, notwithstanding any testamentary disposal of her estate, the sum lent to her daughter “is hereby given to her absolutely and unconditionally for her own use, benefit, and disposal, and . . . the said gift . . . is not to be considered a part of my estate or subject to any condition of my will.” No interest on the loan was ever paid. The testatrix died in March, 1917. By her will, her daughter was appointed one of her executors. The two documents were found enclosed in an envelope with this endorsement: “In the event of my death, this envelope is to be delivered, unopened, to my daughter:”—*Held*, the intention to give being plain and absolute, being communicated to the donee, and continuing until the death of the testatrix, that “*donatio in*

GIFT—(Continued).

presenti tradenda in futuro" was shewn, and that the daughter was not a debtor to her mother's estate in respect of the sum lent or interest thereon.—*Re Goff* (1914), 111 L.T.R. 34, followed.—*Strong v. Bird* (1874), L.R. 18 Eq. 315, and *In re Innes*, [1910] 1 Ch. 188, considered. *Re Barnes*, 352.

See HUSBAND AND WIFE, 2—WILL.

GRAND JURY.

See CRIMINAL LAW, 3.

GRATUITIES.

See COMPANY, 2.

GROUND LEASE.

See LANDLORD AND TENANT, 1.

HARBOUR COMMISSIONERS

See MUNICIPAL CORPORATIONS, 1.

HIGHWAY.

See MUNICIPAL CORPORATIONS, 3—NEGLIGENCE—STREET RAILWAY — TELEPHONE COMPANY.

HIGHWAY CROSSING.

See RAILWAY.

HUSBAND AND WIFE.

1. *Alimony—Action for—Defence—Award of Alimony by Arbitrators—Acceptance of Alimony Payments by Wife—Waiver—Bar to Action—Objections to Award—Right of Wife to Contract.*—The judgment of MASTEN, J., 41 O.L.R. 195, affirmed. *Harrison v. Harrison*, 43.

HUSB. & WIFE—(Continued).

2. *Alimony—Interim Allowance—Property Conveyed by Husband to Wife—Lis Pendens—Wife's Ability to Maintain herself—Expected Gifts from Children—Statement that Husband Possessed of no Property—Right of Wife to Test by Issue of Execution—Quantum of Interim Allowance.*—Upon an application for interim alimony the defendant set up that the plaintiff was able to maintain herself out of land which he had conveyed to her and out of moneys which her children might allow her. It appeared, however, that, although the plaintiff lived in the house upon the land conveyed to her, the land was tied up by the registration of a certificate of *lis pendens*, and the allowances from the children would, if made, be no more than compassionate gifts:—*Held*, that what was thus alleged was no ground for setting aside an order for the payment of \$4 a week as interim alimony.—*Eaton v. Eaton* (1870), L.R. 2 P. & D. 51, and *Knapp v. Knapp* (1887), 12 P.R. 105, distinguished.—The defendant's statement on oath that he had no means out of which payment could be compelled, was no ground for setting aside the order—the plaintiff had the right to test the truth of the statement by an execution. *Peel v. Peel*, 165.

3. *Alimony—Judgment—Allowance from Date of Commencement of Action—Arrears—Costs—Death of Plaintiff between Hearing and Judgment—Rule 304.*—

HUSB. & WIFE—(Continued).

In an action for alimony the defendant did not appear or defend, and judgment for the plaintiff was pronounced, on motion therefor, allowing her alimony from the date of issue of the writ of summons, but not before that date, though it was contended that "six years' back alimony" should be allowed.—*Robinson v. Robinson* (1828), 2 Lee Eccl. R. 593 (appx.), and *Soules v. Soules* (1851), 3 Gr. 113, applied and followed.—The plaintiff was allowed full costs of suit.—The motion for judgment was heard on the 8th April; judgment was given on the 12th April. The plaintiff died on the 11th April; and the Judge, having been advised of her death, directed that the judgment should be entered as of the 8th April: see Rule 304. *McFadden v. McFadden*, 599.

4. *Business Carried on by Husband in his own Name—Capital to Start Business Furnished by Wife from Separate Estate—Increase by Exertions of Husband—Claim by Wife to Assets of Business as against Execution Creditor of Husband—Joint Venture—Partnership—Absence of Agreement as to Shares—Equal Shares—Married Women's Property Act, secs. 4, 7—Husband's Share Liable to Satisfy Execution—Findings of Trial Judge—Credibility of Witnesses—Inferences from Evidence—Appeal.*—In an action brought against a man and his wife by an execution creditor of the husband, the question was, whether or not the assets of a business

HUSB. & WIFE—(Continued).

carried on in the name of the husband were exigible under the plaintiff's execution, as against the claim of the wife; it appeared, among other things, that the business had been begun upon capital supplied by the wife from her separate estate, and had been increased and made profitable by the exertions of both of them, but especially of the husband; and it was held (*HODGINS, J.A.*, and *CLUTE, J.*, dissenting), that the husband had a "proprietary interest" in the business, that he and his wife were partners in it with equal shares (there being no agreement as to shares), and that the husband's share of the partnership business and assets was liable to satisfy the plaintiff's execution.—Sections 4 and 7 of the Married Women's Property Act, R.S.O. 1914, ch. 149, considered.—*Cooney v. Sheppard* (1895), 23 A.R. 4, *Laporte v. Cosstick* (1874), 23 W.R. 131, *In re Helsby* (1893), 63 L.J.Q.B. 261, and *In re Simon*, [1909] 1 K.B. 201, applied and followed.—Judgment of *MIDDLETON, J.*, reversed—the majority of the Court, while accepting his findings as to the credibility of the witnesses, refusing to adopt the inferences drawn by him from the evidence. *Reid v. Morwick*, 224.

5. *Claim of Executors of Deceased Wife to Share of Money Received by Husband—Married Women's Property Act, R.S.O. 1914, ch. 149, secs. 4, 7 (1)—Business Carried on by Husband and Wife—Partnership—Sale of*

HUSB. & WIFE—(Continued).

Business—Termination of Partnership—Instalment of Purchase-money Received by Husband—Liability to Account—Trustee—Constructive Trustee—Limitations Act, R.S.O. 1914, ch. 75, sec. 47 (2)—Evidence—Money Lent by Wife—Interest Received by Husband—Future Instalment of Purchase-money—Declaration—Costs.—Since the Married Women's Property Act, 1884 (now R.S.O. 1914, ch. 149), a married woman has power to contract, even though she has no separate estate, so as to bind any separate estate she may subsequently acquire. She may now be a partner: sec. 4. She may contract with her husband as if she were a *feme sole*; and there may be a partnership between them. The words now found in sec. 7 (1), "in which her husband has no proprietary interest," have the effect of enlarging the rights of a married woman.—*Gibson v. Le Temps Publication Co.* (1904), 8 O.L.R. 707, 708, approved.—The defendant and his wife were equal partners in an hotel business carried on by them; the sale by them of the hotel, including the entire business and assets, was a sale of property in which the wife had an equal interest with her husband; and he was liable to account to her for a portion of the purchase-money which he had received. The sale, while not formally dissolving the partnership, put an end to the business and was in effect a termination of the partnership.—*Crawshay v. Collins* (1808), 15

HUSB. & WIFE—(Continued).

Ves. 218, followed.—In an action by the executors of the wife, who died after the sale, their claim to an account of the purchase-money was considered to be barred, by virtue of the Limitations Act, after the lapse of six years from the receipt of the purchase-money.—The husband was not a trustee for the wife so as to preclude the application of the Limitations Act: there was no suggestion of fraud; and the case was not brought within the exception in sub-sec. (2) of sec. 47 of that Act (R.S.O. 1914, ch. 75).—Review of the authorities.—*Noyes v. Crawley* (1878), 10 Ch. D. 31, *Knox v. Gye* (1872), L.R. 5 H.L. 656, and *Gordon v. Holland* (1913), 82 L.J.P.C. 81, specially referred to.—The plaintiffs were debarred from recovering one-half of an instalment of the purchase-money received by the defendant (the husband); but were held entitled to recover for money lent by the wife to him and for a payment of interest which he received for her—\$537 in all—with County Court costs (without set-off) and costs of an appeal from the judgment of the trial Judge, which dismissed the action.—*RIDDELL, J.*, dissented in part. *Faye v. Roumegous*, 435.

6. *Liability of Wife on Promissory Note and Agreement Signed for Benefit of Husband—Absence of Consideration and of Independent Advice—Duress—Threat—Agent of Person in whose Favour Note and Agreement Ex-*

HUSB. & WIFE—(Continued).
ecuted — Evidence — Findings of Trial Judge.—In an action against a man and his wife to recover a sum of \$500 and for other relief, it appeared that the wife had signed a promissory note and an agreement whereby she had undertaken to pay to the plaintiff, who was the employer of her husband, certain sums of money due by the husband to the plaintiff. The wife was not in any way connected with the business between her husband and the plaintiff:—*Held*, that the wife had no legal and independent advice when she signed the documents, and received no consideration therefor; that she was induced to sign by a threat that the plaintiff would cause her husband to be arrested if she did not do so.—The threat was made by the manager of a bank, who took the note to the defendant. The manager said to the wife that the plaintiff had told him (the manager) that he (the plaintiff) would have the husband arrested if he did not settle; the manager afterwards told the plaintiff what he had said; and the plaintiff never repudiated or disavowed the transaction:—*Held*, that the manager was the agent of the plaintiff in the transaction; and the wife was relieved from liability.—*Bank of Montreal v. Stuart*, [1911] A.C. 120, followed. *McCallum v. Cohoe*, 595.

See INSURANCE, 5.

IDENTITY.

See CRIMINAL LAW, 1.

IMPAIRMENT OF CAPITAL.

See COMPANY, 3.

IMPROVEMENTS.

See LANDLORD AND TENANT, 1.

INDEMNITY.

Action upon Covenant for—Judgment Recovered against Plaintiff—Interest—Costs—Defence to Action—Agreement Inconsistent with Deed Containing Covenant—Failure to Prove Independent Collateral Agreement upon Good Consideration—Special Endorsement—Applicability to Claim for Indemnity—Trial—Amendment—Rule 183—Claim for Damages for Deceit—Unassignable Claim—Duty to Set up in Former Action—Effect of Judgment—Proof of Amount of Claim—Indemnity against Payment of Money not actually Paid—Application of Money.—An action brought to recover the amount of a judgment recovered by L. in a previous action was based upon an indemnity covenant. The defendant set up as a defence an alleged agreement between himself and the plaintiff, that he (the defendant) should be allowed to defend for the plaintiff the action brought by L. and set up therein a claim which he said he had against L. as a defence to L.'s claim against the plaintiff; that the plaintiff broke the agreement by refusing to allow the defendant to defend L.'s action, and allowed judgment to go by default:—*Held*, that the defence set up was not sustained by the evidence: for

INDEMNITY—(Continued).

(1) nothing more than an informal understanding was proved; (2) the defendant had the opportunity which he said he desired—he had been brought in by the plaintiff as a third party in L.'s action, but found that he could get no relief therein, and was discharged out of it; and (3) the alleged agreement would have been inconsistent with the deed; nothing like an independent collateral agreement, based upon a good consideration, was proved; and no claim for reformation of the deed was made.—*Held*, also, that the plaintiff was entitled to recover in this action interest upon the amount of L.'s judgment; and (*semble*) his costs, as between solicitor and client, incurred in L.'s action.—*Held*, also, that the defendant's claim against L., being for damages for deceit, was not assignable; and it could not be said that it was the duty of the present plaintiff to set up that claim in answer to L.'s action.—*Held*, also, that the judgment was not proof against the defendant in this action; but the plaintiff's claim in this action was well-proved by the settlement made and evidenced by the signature of the defendant's solicitor.—*Held*, lastly, that in an action for indemnity, law and equity now being administered in the one Court, a plaintiff may have judgment for the full amount for which he is indemnified, though he has yet paid no part of it, and may never pay any part of it—that is, in cases in which the defendant is not con-

INDEMNITY—(Continued).

cerned in the application of the money; and in this case whether the plaintiff paid L. or not did not affect the defendant, the plaintiff alone being answerable to L.—*Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617, and *British Union and National Insurance Co. v. Rawson*, [1916] 2 Ch. 476, followed. *McDonald v. Peuchen*, 18.

INDEPENDENT ADVICE.

See HUSBAND AND WIFE, 6.

INDIAN.

See DIVISION COURTS, 1.

INDICTMENT.

See CRIMINAL LAW, 3.

INJUNCTION.

Consent Judgment—Motion to Suspend Operation — Jurisdiction.—The defendants, in 1918, sought an order to suspend for a few weeks the operation of an injunction contained in a consent judgment pronounced in January, 1916:—*Held*, that the Court had no jurisdiction to make the order.—There is no law which enables the Court to sanction the breach of a contract or the violation of a judgment granting an injunction.—There is jurisdiction to alter a judgment once entered only when it does not express the real intention of the Court or when it has been obtained fraudulently. The judgment can be attacked only upon grounds upon which a contract can be attacked—and emphatically so when the

INJUNCTION—(Continued).

judgment is a consent judgment.
Lewis v. Chatham Gas Co., 102.

See COMPANY, 1.

INQUEST.

See NEGLIGENCE, 1.

INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES—COMPANY, 5, 6.

INSURANCE.

1. *Fire Insurance—Policies on Stocks of Goods in Different Buildings—Insurance Act, R.S.O. 1914, ch. 183, sec. 194, condition 5—Construction—“Effect other Insurance thereon”—Consolidation of Stocks in one Building—Removal of Goods so that they Become Covered by Policy of another Company—Assent of Insurers—Authority of Agent—Knowledge of Insurers.*]—The plaintiff, a merchant carrying on business in the town of S., in July, 1914, effected an insurance in the G. company on a stock of merchandise in a building in B. street and an insurance in the M. company on another stock in a building in E. street. K., an agent for both companies, received the applications and issued the policies, which he had authority to do. In November, 1915, the plaintiff moved both stocks to a building in D. street, where they were consolidated into one stock; and K. endorsed upon each policy a declaration that the property insured should in future be held insured in the D. street building, and not elsewhere. The policies were renewed in 1916, and were

INSURANCE—(Continued).

in force in January, 1917, when the property insured was damaged by fire in the D. street building; and these actions were brought against the G. company and the M. company to recover the amount of the loss. Both policies were subject to statutory condition 5. The defendants contended that to remove the goods covered by the policy of one company so that they became covered also by the policy of the other company was to “effect . . . other insurance thereon,” and that they were liable only for 60 per cent. of the loss:—*Held*, that the defendants could not succeed upon this contention.—*Harris v. London and Lancashire Fire Insurance Co.* (1866), 10 L.C. Jur. 268, not followed. *Rogers v. General Accident Fire and Life Assurance Corporation Limited*, *Rogers v. Mercantile Fire Insurance Co.*, 419.

2. *Life Insurance—Application for Insurance Made and Premium Paid—Powers of Local Agent—By-laws of Insurance Company—Principal Officers—Approval of Application by Medical Referee—Death of Applicant before Acceptance of Application by Issue of Policy or otherwise—Failure to Prove Contract—What Constitutes a Contract—Insurance Act, R.S.O. 1914, ch. 183, secs. 2 (14), 155.*]—In an action by the widow of R. upon what she alleged to be a contract of insurance:—*Held*, upon the evidence, and having regard to the limited powers of C., the local agent who procured R. to sign an applica-

INSURANCE—(Continued).

tion for a policy, and the by-laws of the defendants, which provided that the manager, assistant-manager, and acting-manager were the only officers empowered to bind the defendants by an insurance contract, and that they could do so only after the application has been approved by the medical referee—who in this case never saw the application until after the death of R.—that there never was any insurance contract between the defendants and R.—*Per* MULLOCK, C.J.Ex.:—A policy is evidence of a contract, but is not itself the contract. The contract may be by parol, in which case there is no policy to submit to the applicant for acceptance or refusal. The application is an offer, and may be accepted by any sufficient corporate act—not necessarily the granting of a policy. Sections 2 (14) and 155 of the Insurance Act, R.S.O. 1914, ch. 183, referred to.—The *dictum* of RIDDELL, J., in *Sharkey v. Yorkshire Insurance Co.* (1916), 37 O.L.R. 344, at p. 352, repeated in this case, that the ordinary application for insurance is not a tender which will become a contract, but a request to the company to offer a policy, that, if the company tender a policy on such request, the applicant may decline to accept it, and that, if the applicant accept the policy tendered, then and only then is the contract complete, not assented to by MULLOCK, C.J.Ex. *Robinson v. London Life Insurance Co.*, 527.

INSURANCE—(Continued).

3. *Life Insurance—Change of Beneficiary—Preferred Class—Declaration in Writing—Sufficiency—Insurance Act, R.S.O. 1914, ch. 183, sec. 171 (5)—Will—Printed Form—"Personal Estate"—Inclusion of Insurance Moneys—Effect of Printed Explanatory Clause—Wills Act, R.S.O. 1914, ch. 120, secs. 2, 12 (2), 30—Interlineation—Nuncupative Will—Wills Act, sec. 14.*—The beneficiaries named in an insurance policy on the life of M. were his father, mother and a brother. M. died leaving a will executed when he was on active service abroad as a soldier. This will was framed by filling up the blanks in a printed form of a "soldier's will." The directions for filling in the blanks and for execution and attestation were in the body of the document, not in the margin. The will as drawn up and executed contained this clause: "My personal estate I bequeath to my wife" (naming her); and beneath the place for the signature, where M. had affixed his signature, and above the *testimonium* clause, were the printed words: N.B. Personal estate includes . . . insurance policy, in fact everything except real estate:—*Held*, that, whether or not this document operated as a will making a valid disposition of the insurance money, it was a declaration under sub-sec. (5) of sec. 171 of the Ontario Insurance Act, sufficient to effect a valid change in the beneficiary in favour of the wife, one of the pre-

INSURANCE—(Continued).

ferred class, substituting her for the original beneficiaries. — *Semble*, that, although the *nota bene* clause was not part of the will, because not intended to be so, it was not to be ignored altogether—it should be taken as explanatory of what was included in the term “personal estate;” and the document might be regarded as a testamentary document supporting the claim of the wife to the insurance money. Sections 2, 12 (2), and 30 of the Wills Act considered.—*Semble*, also, that, if the *nota bene* clause should be deemed to have been intended to be part of the will, it might be treated as an interlineation, self-evidently made before the execution of the will and above the *testimonium* clause, and so supporting the wife’s claim. But, treating the document as a nuncupative will, under sec. 14 of the Wills Act, the wife was not aided, because that section authorises a disposal of “personal estate” as interpreted by that enactment only. *Re Monkman and Canadian Order of Chosen Friends*, 363.

4. *Life Insurance—Lapse of Policy by Non-payment of Premium—Evidence of Revival—Onus—Acceptance by Agent of Insurance Company of Amount of Premium after Lapse and when Insured in Articulo Mortis—Terms and Conditions of Policy—Notice to Beneficiary—Official Receipt—Waiver—Absence of Knowledge of Impending Death—Premium not Actually Accepted by*

INSURANCE—(Continued.)

Insurance Company.]—The plaintiff’s husband, whose life was insured by the defendants, by a policy under which she was the beneficiary, died on the 22nd August, 1917, having been ill for one week. On the day before the death, the plaintiff paid to an agent of the defendants the amount of a premium which had been overdue since the previous 15th July. The agent gave the plaintiff a receipt for the amount, signed by himself, and containing the words “official receipt to follow.” The agent handed the money to the defendants’ book-keeper, who, on the 22nd August, sent the official receipt, dated the 22nd August, signed by the manager and countersigned by the agent. This receipt stated on its face that agents were not authorised to receive premiums after the expiration of the days of grace, and that any person making such payment does so on the agreement that the acceptance thereof by the company shall not be regarded as evidence of waiver of any of the terms or conditions of the policy:—*Held*, accepting the statement of the plaintiff that the agent had said nothing to her about furnishing a certificate of health when she paid him the money, that, nevertheless, having regard to the terms and conditions of the policy, she could not recover.—The policy had lapsed; the onus was on the plaintiff to shew that it was revived; and she was confronted with abundant notice of the conditions upon which alone

INSURANCE—(Continued).

it could be revived.—The defendants could not waive the forfeiture without notice or knowledge of the fact that the insured was, when the money was paid, *in articulo mortis*.—The money never “got home” to the defendants, in the sense of being accepted and regularly entered in their books. *Foxwell v. Policy Holders Mutual Life Insurance Co.*, 347.

5. *Life Insurance—Policy Payable to Wife—Foreign Divorce Obtained by Wife—Invalidity of Divorce—Right of Wife to Assert—Change of Beneficiary by Will—Right to Divert Fund to Beneficiaries not of Preferred Class—Wife Ceasing to be of Preferred Class.*—B. obtained a policy of insurance on his life, payable to his wife by name. Some time after the date of the policy, she obtained a divorce in a foreign State. By his will, B. gave one-third of the insurance money to his son and one-third each to his brother and sister:—*Held*, that it was not open to the wife, after the death of B., to maintain that the divorce was invalid.—*Swaizie v. Swaizie* (1899), 31 O.R. 324, and *In re Williams and Ancient Order of United Workmen* (1907), 14 O.L.R. 482, followed.—*Held*, also, that when she obtained the divorce she ceased to be in law B.’s wife, and so ceased to be within the preferred class; and B. might, at his will, divert to one not of the preferred class, and so effectively exclude the wife, although the divorce alone would not exclude her. *Re Banks*, 64.

INTEREST.

See *HUSBAND AND WIFE*, 5—*INDEMNITY—MORTGAGE*, 2.

INTERIM ALIMONY.

See *HUSBAND AND WIFE*, 2.

INTERLOCUTORY MOTION.

See *COSTS*, 4.

INTOXICATING LIQUORS.

See *ONTARIO TEMPERANCE ACT*.

JOINT TORT-FEASORS.

See *FRAUD AND MISREPRESENTATION*.

JUDGE'S CHARGE.

See *NEGLIGENCE*.

JUDGMENT.

Order Dismissing Action—Reversal on Appeal—Application by Defendants to Add to Order of Appellate Court an Order for Judgment for Plaintiff—Proposed Appeal to Supreme Court of Canada—Application Opposed by Plaintiff—Unnecessary Application—Right of Appeal to Supreme Court—Supreme Court Act, R.S.C. 1906, ch. 139, sec. 2 (e)—Amending Act, 3 & 4 Geo. V. ch. 51, sec. 1—Giving Defendants Conduct of Plaintiff's Case.—The order of SUTHERLAND, J., 40 O.L.R. 548, dismissing this action, having been set aside by an order made upon appeal to a Divisional Court of the Appellate Division, 41 O.L.R. 217, the defendants, having no defence upon the merits to the action, asked the same Divisional Court to add to its order a direction that judgment be entered in the action in

JUDGMENT—*(Continued).*

favour of the plaintiff—the defendants' purpose being to have a judgment from which they could appeal to the Supreme Court of Canada. The application was opposed by the plaintiff, and was dismissed; the Court holding (1) that it was unnecessary, as a right of appeal existed even without the aid of the Act of 1913, 3 & 4 Geo. V. ch. 51, sec. 1, repealing para. (e) of sec. 2 of the Supreme Court Act, R.S.C. 1906, ch. 139, and substituting a new para. (e), which extended the right of appeal; and (2) that the defendants should not be given the conduct of the plaintiff's case against his will. *Appelbe v. Windsor Security Co. of Canada Limited*, 16.

See CHATTEL MORTGAGE — FRAUD AND MISREPRESENTATION — HUSBAND AND WIFE, 3 — INDEMNITY — INJUNCTION — MECHANICS' LIENS — NEGLIGENCE, 2 — TRIAL.

JUDGMENT DEBTOR.

See DIVISION COURTS, 1.

JURISDICTION.

See DIVISION COURTS — EXECUTION — INJUNCTION — JUDGMENT — STREET RAILWAY, 1, 2.

JURY.

See CRIMINAL LAW, 3 — NEGLIGENCE — PRINCIPAL AND AGENT — RAILWAY.

LAND.

See MECHANICS' LIENS — PRINCIPAL AND AGENT — VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. *Ground Lease—Buildings of Tenant—Covenants and Provisoes in Lease—Determination by Arbitration of Value of "Buildings and Improvements" at Expiration of Lease—Construction of Lease—"Buildings Fixtures or Things"—"Buildings Erections or Improvements"—Mode of Valuation—"Abstractedly"—"Just and Proper Value"—"Renewal Value"—Use and Value to Landlord—"Fixtures" Forming Integral Part of Premises.*]—A lease of land contained a covenant by the lessor to pay, after the expiration of the term, the "just and proper value," at the time of the expiration, "of such buildings and improvements as may then be erected and standing on the said hereby demised premises;" such value to be determined by arbitration; proviso, "that in determining the amount of the worth or value of any buildings erections or improvements standing and being upon the said demised premises at the end of any twenty-one years the said arbitrators are to judge of such buildings erections and improvements abstractedly and without reference to site or renewal value but are only to consider the cost of erection and deducting for age decay wear and tear and damages sustained." In other parts of the lease various expressions were used, such as: "all future erections," "buildings fixtures or things now or hereafter to be erected or being on the demised premises." There was no covenant permitting the lessee to re-

LAND. & TENT.—(*Continued*). move his fixtures. An arbitration to fix the value of the buildings upon the demised premises having been begun, the arbitrators stated a case for the determination of the Court:—*Held*, that the words to be interpreted were those in the covenant to pay, “buildings and improvements,” and not “buildings fixtures or things,” or “buildings erections or improvements,” and that the words actually used in the covenant to pay were not to be cut down so as to exclude “fixtures and things” or “erections.”—The “just and proper value” at the expiration of the lease was to be determined in accordance with the proviso, which required the “worth or value” of the buildings to be determined “abstractedly,” without reference to site or renewal value, and on the basis of “cost of erection,” less depreciation; these expressions meant that there should be excluded from the consideration of the arbitrators the element of suitability for the particular site and the “renewal value” of the buildings—the value was to be judged in the abstract, apart from the local situs or particular use, and upon the basis of cost only. The landlord was not to have any advantage from increase in the value of materials, etc., nor to have saddled upon him any loss due to the decrease in value or the improvident bargain of the tenant. “Renewal value” did not mean cost of replacement, but the value upon the renewal

LAND. & TENT.—(*Continued*). of the lease, as a factor in determining the rent.—The element of use and value to the landlord was not a factor in the valuation.—The words “buildings and improvements” did not include purely chattel property; effect must be given to the other words used, “erected and standing on the . . . demised premises;” and all that in any fair sense fell within this description, if in good faith brought upon the demised premises and forming an integral part thereof, must be paid for by the landlord. *Re McConkey Arbitration*, 380.

2. *Lease of Suite of Apartments*—*Finding of Trial Judge that Suite Let Partly Furnished—Reversal on Appeal—Absence of Implication of Warranty of Fitness for Human Habitation—Action for Rent—Tenant Leaving Premises because Uninhabitable—Costs.*—The rule that, in the case of a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied, is applicable to the letting of an unfurnished suite of apartments. — *Held*, that the lease in question in this case was not a demise of furnished premises; and the case was not brought within the rule applied in *Davey v. Christoff* (1916), 36 O.L.R. 123, following *Smith v. Marrable* (1843), 11 M. & W. 5, and *Wilson v. Finch Hatton* (1877), 2 Ex. D. 336.—The finding of the Senior Judge of the County Court of the County of

LAND. & TENT.—(*Continued*).
York that the premises were partly furnished, and his judgment dismissing an action for rent, were reversed on appeal.—The plaintiff, in the exceptional circumstances of the case, was allowed only the costs of the appeal; no costs in the Court below were allowed. *St. George Mansions Limited v. Hetherington*, 10.

3. *Lease under Short Forms of Leases Act—Default in Payment of Rent—Termination of Lease by Oral Agreement—Surrender—Refusal to Give up Possession—Institution of Summary Proceedings for Recovery of Possession—Landlord and Tenant Act, Part III.—Overholding Tenant—Rent Overdue for 15 Days—Right of Re-entry—Short Forms of Leases Act, schedule B., No. 12—Landlord and Tenant Act, sec. 19—Tender of Amount of Rent Overdue—Effect of—Independent Right of Re-entry not Waived by Acceptance of Rent in Arrear—Equitable Relief from Forfeiture—Powers of County Court Judge in Summary Proceedings—Power of Court under sec. 78 (2) of Landlord and Tenant Act—Conduct of Tenant.*
—By a lease made in 1916, in pursuance of the Short Forms of Leases Act, B. demised land to O. for five years, at a rental of \$100 a month, payable on the first day of each month of the term. On the 22nd July, 1917, two months' rent being in arrear, B. and O. met, and, according to B.'s story, O. agreed to give up possession on the 10th August. O. said that

LAND. & TENT.—(*Continued*).
he agreed to give up possession, only in the event of a sale. B. rented the premises to another man. O. refused to vacate, and on the 25th July tendered the amount of rent in arrear, which was refused. B., on the 13th August, instituted summary proceedings under Part III. of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, and obtained from the Judge of the County Court an order for a writ of possession, from which O. appealed:—*Held*, that the lease had not been terminated by agreement between the parties; the agreement, if made, rested in parol, and could not operate as a surrender of the lease; O. did not give up possession, and there was no surrender by operation of law.—(2) The institution of the summary proceedings was an unequivocal exercise of the lessor's option to determine the lease, exercising his right of re-entry for non-payment of rent overdue for 15 days: Short Forms of Leases Act, R.S.O. 1914, ch. 116, sched. B., No. 12; Landlord and Tenant Act, sec. 19.—(3) The tender was in respect of rent overdue prior to the forfeiture, and its acceptance would not have operated as a waiver of the right of re-entry: acceptance of rent is not an affirmation of the continuance of the relations of landlord and tenant; the right to recover the arrears of rent and the right of re-entry are not alternative but independent rights.—(4) It was not open to the County Court Judge, acting under the

LAND. & TENT.—(*Continued*). provisions of Part III. of the Landlord and Tenant Act, to consider whether the tenant was entitled to equitable relief from forfeiture: if the tenant desired equitable relief, he must seek it in the manner provided by sec. 20, by bringing an independent action or by an application to the Court in any action brought by the lessor to enforce his right of re-entry. — (5) The Divisional Court hearing the appeal is entitled, under sec. 78 (2), if of opinion that the right to possession should not be determined summarily, to discharge the order of the Judge, and leave the landlord to his action for recovery of possession; but the conduct of the tenant was not such as to induce the Court to give him an opportunity of obtaining relief from the forfeiture. *Re Bagshaw and O'Connor*, 466.

See ARBITRATION AND AWARD.

LEASE.

See ASSIGNMENTS AND PREFERENCES—LANDLORD AND TENANT.

LEASE OF APARTMENTS.

See LANDLORD AND TENANT, 2.

LEAVE TO APPEAL.

See STREET RAILWAY, 2 — WRIT OF SUMMONS, 1.

LEGACY.

See WILL.

LIBEL.

Pamphlet Secretly Printed—Action against Printer—Discovery—Examination of Defendant—Un-

LIBEL—(*Continued*).

dertaking to Admit Publication—Disclosure of Name of Person to whom Printed Copies Given—Relevant Fact—Name of Witness—Oppression—Purpose outside of Action—Bona Fides—Damages.] —In an action for libel, based on a pamphlet printed by the defendant, who pleaded only that the document was not capable of nor intended to have the meaning attributed to it in the statement of claim, the defendant, on examination for discovery, refused to disclose the name of the person to whom he gave the copies of the pamphlet after he had printed them, and refused to answer questions the answers to which might give a clue to the identity of that person; the defendant said, however, that that person brought him the manuscript to print; and it appeared that the defendant destroyed the manuscript after printing it. The defendant undertook that at the trial he would admit publication by him of the pamphlet:—*Held*, that the name of the person referred to was a relevant fact in the case, and the plaintiff was entitled to information with regard to that fact, although it involved the disclosure of the name of a witness.—*Marriott v. Chamberlain* (1886), 17 Q.B.D. 154, followed. — *Massey-Harris Co. v. De Laval Separator Co.* (1906), 11 O.L.R. 227, 591, approved.—This case did not come within either of the exceptions to the rule stated in *Marriott v. Chamberlain*: the answers to the questions would not entail any-

LIBEL—(*Continued*).

thing in the nature of oppression; and the exception of a case where the question is put for a purpose outside the action is applicable only to newspapers.—Although the publication was admitted, the manner of it was relevant to the issue as to *bona fides* and upon the question of damages. *Hays v. Weiland*, 637.

See CRIMINAL LAW, 3.

LICENSE.

See ASSIGNMENTS AND PREFERENCES.

LIEN.

See MECHANICS' LIENS.

LIFE ESTATE.

See WILL, 7.

LIFE INSURANCE.

See INSURANCE, 2-5.

LIMITATION OF ACTIONS.

See EXECUTORS AND ADMINISTRATORS, 2 — HUSBAND AND WIFE, 5.

LIQUIDATOR.

See COMPANY, 5, 6.

LIQUORS.

See ONTARIO TEMPERANCE ACT.

LIS PENDENS.

See HUSBAND AND WIFE, 2.

LOAN.

See GIFT.

MAGISTRATE.

See ONTARIO TEMPERANCE ACT.

MARRIAGE.

See HUSBAND AND WIFE.

MARRIAGE SETTLEMENT.

See TRUSTS AND TRUSTEES.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MARRIED WOMEN'S PROPERTY ACT.

See HUSBAND AND WIFE, 4, 5.

MASTER AND SERVANT.

See COMPANY, 1, 2—PUBLIC HEALTH ACT.

MECHANICS' LIENS.

Lien of Material-men — Materials Delivered to Contractor but not upon Land Sought to be Affected — Proximity to Land — Lien upon Land and Building — Lien upon Materials — Damages Suffered by Owner by Non-completion — Inquiry as to — Stating Result in Judgment — Mechanics and Wage-earners Lien Act, R.S.O. 1914, ch. 140, secs. 6, 16, 37 (3).—Material-men claimed a lien upon their own goods which they had sold to the contractors for the erection of a building, who had become insolvent. The materials were delivered upon the street in front of the building in course of erection and the land upon which the lien was claimed, but never actually reached the land:—*Held*, that a lien under the Mechanics and Wage-earners Lien Act, either on the land or on the materials, is not created by mere appropriation of goods to a contract, or on delivery to the owner or contractor, unless they are placed upon or reach the land to

MECS. LIENS—(*Continued*).
 be affected.—The general lien under sec. 6, and the special one in the nature of a vendor's lien upon the materials themselves under sec. 16, depend upon the same condition—the placing of the materials upon the land. Proximity to the land is not enough; the materials must be on it, so that either in fact or in contemplation of law the value of the land itself is enhanced by their presence.—*Ludlam-Ainslie Lumber Co. v. Fallis* (1909), 19 O.L.R. 419, applied.—The damages suffered by an owner owing to non-completion, while not available to him as a set-off against claims for wages, nor to diminish the statutory percentage required to be retained by him, may be and sometimes must be gone into before the Judge or officer trying a case under the Act. To ascertain the sum justly due from the owner to the contractor necessitates an inquiry, where a case is made for it, as to the value of the work done and the damages suffered—to be set off or deducted—for work undone or improperly done or for delay; and, in a case where such an inquiry is proper, the result may be stated in the judgment: sec. 37 (3). *Milton Pressed Brick Co. v. Whalley*, 369.

MEDICAL REFEREE.

See INSURANCE, 2.

MISCONDUCT.

See COMPANY, 1—SLANDER, 2.

MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION.

MONEY BY-LAW.

See MUNICIPAL CORPORATIONS, 2, 3.

MONEY LENT.

See HUSBAND AND WIFE, 5.

MONOPOLY.

See TELEPHONE COMPANY.

MORATORIUM.

See MORTGAGE, 2.

MORTGAGE.

1. *Finding as to Amount of Principal Due thereon—Mortgage Given in Part to Raise Money to Make Down-payment on Agreement for Purchase of other Land from Mortgagee—Default of Purchaser under Agreement—Notice of Cancellation Given by Vendor—Abandonment by Purchaser—Forfeiture of Down-payment—Conduct of Purchaser.*—W. bought land (parcel A) from S. for \$2,000, of which \$500 was to be paid in cash and the remainder by instalments. W., not having \$500 to make the down-payment, and requiring \$200 as well, made a second mortgage in favour of S. upon another parcel of land (parcel B) for \$700; he received \$200 from S., and S. apparently treated the down-payment as made. W. paid no further sum upon his agreement to purchase parcel A, but he went into possession and made some slight improvements. Pursuant to provisions in the agreement, S. gave notice

MORTGAGE—(Continued).

of cancellation; and W., being unable to pay, and not desiring to carry out his agreement, went out of possession. W. having made default in respect of the first mortgage upon parcel B, the first mortgagee brought this action to enforce it; a reference was directed to take the accounts; S. was added as a party in the Referee's office, and it was found that \$700 was due upon S.'s second mortgage. W. contended that the mortgage was security for \$200 only, S. having rescinded the agreement of purchase:—*Held*, that the mortgage to S. was not, as contended, to the extent of \$500, merely security for the payment of that sum upon the agreement of purchase; the mortgage must be construed as given for \$700 actually lent; and the rescission of the agreement did not affect the consideration mentioned in the mortgage.—*Fraser v. Ryan* (1897), 24 A.R. 441, distinguished.—(2) Upon the rescission of the contract by the vendor, the purchaser is not in all cases entitled to a return of moneys paid on account of the contract. The real cause of the rescission was the purchaser's default; and he, not seeking specific performance nor submitting his willingness to carry out the contract, was not entitled to repayment of the \$500 regarded as money paid by him under the contract.—Review of the authorities.—*Boyd v. Richards* (1913), 29 O.L.R. 119, and *Steedman v. Drinkle*, [1916] 1 A.C. 275, distinguished.—*Howe v. Smith*

MORTGAGE—(Continued).

(1884), 27 Ch. D. 89, and *Stickney v. Keeble*, [1915] A.C. 386, specially referred to.—A purchaser who is unable to carry out his contract will not be allowed to abandon his purchase and claim the return of his part payments, when the vendor has given formal notice of cancellation. *Walsh v. Willaughan*, 455.

2. *Mortgagors and Purchasers Relief Act, 1915*, 5 Geo. V. ch. 22, sec. 2 (1) (a)—*Application of Act to Derivative Mortgage—Mortgages Act, R.S.O. 1914*, ch. 112, sec. 2 (d)—*Stay of Proceedings—Delay—Sufficiency of Security—Interest*.]—The *Mortgagors and Purchasers Relief Act, 1915*, 5 Geo. V. ch. 22, is a statute calling for a liberal interpretation; and the case of a derivative mortgage falls within its provisions without doing any violence to them.—Section 2 (1) (a) of the said Act and sec. 2 (d) of the *Mortgages Act, R.S.O. 1914*, ch. 112, considered.—In the circumstances of this case, proceedings upon a derivative mortgage were stayed, at the instance of the mortgagees, the makers of the derivative mortgage.—The intention of the Act is to permit delay; and delay should be granted so long as the ultimate recovery of the money is not jeopardised, and reasonable compensation by way of interest is paid. *Re Shepard and Rosevear and Moyes Chemical Co. Limited*, *Re Moyes Chemical Co. Limited and Halsted*, 184.

See TRUSTS AND TRUSTEES.

MOTOR VEHICLES ACT.

See NEGLIGENCE.

MUNICIPAL CORPORATIONS.

1. *Expropriation by City Corporation by By-law of Land for Park Purposes—Municipal Act, 1903, sec. 576 (1)—Conveyance of Land to Harbour Commissioners—Control Retained by City Corporation—Bona Fides—Agreement Validated by 5 Geo. V. ch. 76 (O.)—Extended Area of City—Defect in Proclamation of Lieutenant-Governor—Misdescription of Land—Surplusage—Remedy by 6 Geo. V. ch. 96, sec. 2 (O.)—Validity of By-law—Waiver—Estoppel—Costs.*—The plaintiff sought to recover possession of certain water-lots which had been expropriated for park purposes by a by-law of the city council, alleging that the by-law was inoperative and invalid. An arbitration had been begun to determine the value of the water-lots with a view to compensating the plaintiff, and \$50,000 had been paid by the city corporation to the plaintiff on account of the compensation:—*Held*, that the by-law was passed in pursuance of a well-considered, definite plan for park extension and construction, in the *bonâ fide* exercise of the powers conferred by sec. 576 (1) of the Municipal Act, 1903, and with the intention of administering and permanently using this and other land embraced in the park area for the purposes in that section defined; that the city council did not abandon its purpose or lose its control by con-

MUN. CORPS.—(Continued).

veying to the defendants, and was bound to make good the title it purported to convey in pursuance of a combined scheme of park and harbour improvements; that the two water-lots and the other lands in the neighbourhood were not required for and could not be utilised for harbour development or improvement in a commercial sense; that, before and at the time of the execution of the conveyance to the defendants, it was intended by the parties thereto that the city corporation should retain or resume effective control of these lots and other lands as park lands, and that this purpose was effectively secured by an agreement executed on the 26th November, 1914, and validated by the Ontario Act 5 Geo. V. ch. 76; that, if the by-law was invalid or inoperative by reason of a defect (and *semble* there was no substantial defect, for certain words might be rejected as surplusage) in the proclamation of the Lieutenant-Governor defining the extended area of the city, made in 1903, the defect had been remedied by the Ontario Act 6 Geo. V. ch. 96, sec. 2; that the plaintiff's lots were therefore properly located and described in the by-law, and legally expropriated; and, at all events, that, after all that had occurred and been done, to the knowledge and with the concurrence of the plaintiff, including possession and expenditure of money upon the property, the plaintiff could not now be heard to object.—*Held*, also, that, while the action should be

MUN. CORPS.—(*Continued*).
dismissed, the defendants should not recover costs from the plaintiff; for the agents of the city council, by a series of blunders, had afforded some excuse for the litigation; and the defendants and the city corporation were substantially the same body. *Watson v. Toronto Harbour Commissioners*, 65.

2. *Money By-law — Assent of Electors*—*Municipal Act, secs. 2 (o), 263 (5)*—*Necessary Publication in Newspaper of Municipality*—*Imperative Duty*—*Non-compliance with Direction of Statute*—*Disregard of Principles of Act*—*Application of Curative Provisions of sec. 150.*]—A village by-law which, under sec. 263 of the *Municipal Act*, R.S.O. 1914, ch. 192, required the assent of the electors, was quashed because a copy of the proposed by-law was not published in a newspaper in the village—there being such a newspaper—but was published in a newspaper of another village some miles distant, contrary to the provisions of sec. 263 (5), read in the light of the definition of “published” in sec. 2 (o). It was held, that the statutory duty to publish was imperative; that failure to publish was a disregard of the principles of the Act; and, therefore, the defect or irregularity was not cured by the application of the saving provisions of sec. 150.—Decision of MEREDITH, C.J.C.P., 42 O.L.R. 6, reversed. *Re Poulin and Village of L'Orignal*, 483.

MUN. CORPS.—(*Continued*).

3. *Money By-law*—*Submission to Electors*—*Purpose of By-law*—*Improvement of Highways and Erection of Bridge*—*Two Sums to be Raised upon one By-law*—“Object”—*Municipal Act, sec. 288 (1) (a)*—*Interpretation Act, sec. 28 (i).*]—A by-law for raising money for the improvement of highways, including the erection of a bridge, part of a highway, all in the village—\$4,000 for the roads and \$2,000 for the bridge—was submitted to the electors and passed by the council:—Held, by MEREDITH, C.J.C.P., that an objection made, that the two sums could not lawfully be raised upon the one by-law—that some of the voters might desire to vote for raising one sum and against raising the other, and that there was no power to deprive them of the right to do so—could not prevail.—Section 288 (1) (a) of the *Municipal Act* and sec. 28 (i) of the *Interpretation Act*, R.S.O. 1914, ch. 1, referred to.—The order of MEREDITH, C.J.C.P., refusing to quash the by-law, was reversed upon another ground (see ante 2). *Re Poulin and Village of L'Orignal*, 6.

See EXECUTION — STREET RAILWAY — TELEPHONE COMPANY.

MUNICIPAL FRANCHISES ACT.

See TELEPHONE COMPANY.

NEGLIGENCE.

1. *Collision of Motor-vehicles in Highway — Passenger in one*

NEGLIGENCE—(Continued).

Vehicle Killed—Action under Fatal Accidents Act against Owners of other Vehicle—Findings of Jury on Questions Submitted—Form of Questions—Evidence of Negligence—Motor Vehicles Act, sec. 11 (2)—Judge's Charge—Liability for Negligence Causing or Contributing to Accident, notwithstanding Negligence of other Wrongdoer—Passenger not Affected by Negligence of Driver—Trial—Conviction of Driver for Manslaughter at same Assizes—Knowledge of Jurors—Some Jurors Serving on both Juries—Effect of—Absence of Complaint at Trial—Refusal to Admit Verdict of Coroner's Jury and Indictments in Evidence—Unsatisfactory Findings—New Trial.]—The plaintiff's husband, seated in the side-car of a motor-cycle, owned and driven by L., was killed in a collision between the motor-cycle and a motor-truck, owned by the defendants and driven by W., upon a city highway. This action was brought, under the Fatal Accidents Act, to recover damages for his death. L. and W. were severally charged with manslaughter by reason of the death of the plaintiff's husband; the grand jury found a true bill against L., and he was tried and convicted, but the bill against W. was ignored by the grand jury. This action was tried at the assizes at which the criminal proceedings were had; some of the jurors who convicted L. were on the jury which tried this action; and the counsel for the

NEGLIGENCE—(Continued).

Crown in the criminal case was counsel for the defendants in the trial of the action:—*Held* (RIDDELL, J., dissenting), that, having regard to the knowledge of the jury of the result of the criminal proceedings, and the evidence and the Judge's charge at the trial of the action, the findings of the jury were unsatisfactory; and there should be a new trial.—There was evidence upon which the jury might have found that the defendants' driver, W., was guilty of negligence which caused or contributed to the accident. The attention of the jury should have been directed to sec. 11 (2) of the Motor Vehicles Act, R.S.O. 1914, ch. 207. The jury should have been distinctly told that, unless the deceased was guilty of some default amounting to contributory negligence, he was not affected by the fact that L. was guilty of negligence that caused the accident; and that they might find the defendants guilty of negligence if W.'s conduct contributed to the accident, notwithstanding their finding that L. was also guilty of negligence. A person injured by more than one wrongdoer may maintain an action for the whole damage to him against any of them. The jury should also have been instructed that the criminal proceedings determined nothing in regard to the civil liability of the defendants.—*Mills v. Armstrong, The Bernina* (1888), 13 App. Cas. 1, followed. *Coop v. Robert Simpson Co.*, 488.

NEGLIGENCE—(Continued).

2. *Collision of Motor-vehicles in Highway—Proof of Negligence—Onus—Evidence—Motor Vehicles Act, sec. 23—Judge's Charge—Findings of Jury—Form of Questions—Meaning of Answers—Questions Left Unanswered—Contributory Negligence—Ultimate Negligence—Proper Judgment on Findings.*—The plaintiff sued for damages for injury and loss sustained by him by reason of a collision between his motor-cycle, upon which he was proceeding in an easterly direction upon a city street, and the defendant's motor car, which he was driving in a southerly direction, upon an intersecting street. The defendant had the right of way. Each saw the other, but only a few moments before the collision. The plaintiff put on his brakes and reduced his speed, but kept straight on, and blew his horn. The defendant momentarily checked his speed; but, supposing that if he stopped he would come to a standstill directly in front of the plaintiff, went on, swerving to the east, thinking to give more room. The result was the collision. In answer to questions, the jury made certain findings:—*Held* (MAGEE and FERGUSON, JJ.A., dissenting), that the answers of the jury indicated that both parties were to blame for the collision, and the action was properly dismissed; there being nothing to suggest that the defendant was guilty of ultimate negligence.—Discussion of the Judge's charge and the question of the onus of proof, having re-

NEGLIGENCE—(Continued).

gard to sec. 23 of the Motor Vehicles Act, R.S.O. 1914, ch. 207 — *Per* MAGEE and FERGUSON, JJ.A.:—The real meaning of the answers of the jury, taking into account their failure to answer questions 10 and 11, was left in doubt, and there should be a new trial. *Judson v. Haines*, 629.

See RAILWAY.

NEW TRIAL.

See NEGLIGENCE, 1.

NEWSPAPER.

See MUNICIPAL CORPORATIONS, 2.

NEXT OF KIN.

See EXECUTORS AND ADMINISTRATORS, 2.

NOMINAL DAMAGES.

See SLANDER, 2.

NOTICE OF CANCELLATION.

See MORTGAGE, 1.

NOTICE OF TRIAL.

See TRIAL.

ONTARIO RAILWAY AND MUNICIPAL BOARD.

See STREET RAILWAY, 1, 2.

ONTARIO TEMPERANCE ACT.

1. *Magistrate's Conviction for Offence against sec. 41 (1)—Having Intoxicating Liquor in Place other than "Private Dwelling-house"—Flat in "Duplex House"—Sec. 2 (i) (i.)*—One section of what is commonly called "a du-

ONT. TEMP. ACT—(Continued).
 plex house"—that is, two dwellings under one roof, an upper flat and a lower flat—is a "private dwelling-house" within the meaning of sec. 41 (1) of the Ontario Temperance Act, 6 Geo. V. ch. 50, and to have intoxicating liquor there is not an offence against the Act. Such a dwelling is not a "house or building the rooms or compartments in which are leased to different persons," within the meaning of sec. 2 (i) (i.) of the Act.—*Rex v. Purdy* (1917), 41 O.L.R. 49, distinguished. *Rex v. Carswell*, 34.

2. *Magistrate's Conviction for Offence against sec. 51—Physician—Prescription for Intoxicating Liquor—Evasion of Act—Evidence of Large Number of Similar Prescriptions—Admissibility—Bona Fides—Motive—Finding of Magistrate—Review—Form of Prescription—Non-compliance with Statute.*—The defendant, a practising physician, was convicted by a magistrate of an offence against the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50, sec. 51, as amended by the Ontario Temperance Amendment Act, 1917, 7 Geo. V. ch. 50, sec. 18, by giving to one M. a prescription for one pint of alcohol, in evasion and violation of the Act, and for the purpose of enabling and assisting him to evade the Act and to obtain intoxicating liquor for use as a beverage:—*Held*, that evidence tending to establish that the defendant had issued a great number of requisitions for potable liquor for bathing purposes, was properly admitted by

ONT. TEMP. ACT—(Continued).
 the magistrate. — *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, followed. —And *held*, that the question of *bona fides* was for the magistrate, and his finding could not be reviewed on a motion to quash the conviction.—The defendant, in filling up the prescription for M. and other prescriptions, had not complied with the Act; the name of the patient and the nature of the illness must be stated so that the *bona fides* may be tested. *Rex v. Welford*, 359.

OPPRESSION.

See COMPANY, 2—LIBEL.

ORIGINATING MOTION.

See COSTS, 4.

OVERHOLDING TENANT.

See LANDLORD AND TENANT, 3.

PAMPHLET.

See LIBEL.

PAPER TITLE.

See VENDOR AND PURCHASER.

PARENT AND CHILD.

See GIFT—PRINCIPAL AND AGENT—PUBLIC HEALTH ACT.

PARK.

See MUNICIPAL CORPORATIONS, 1.

PARTICULARS.

See CRIMINAL LAW, 3—SLANDER, 1.

PARTIES.

See COMPANY, 5—COSTS, 2—WATER.

PARTNERSHIP.*See* HUSBAND AND WIFE, 4, 5.**PASSENGER.***See* NEGLIGENCE, 1.**PERPETUAL TRUST.***See* WILL, 9.**PERPETUITY.***See* WILL, 1.**PHYSICIAN.***See* ONTARIO TEMPERANCE ACT, 2—PUBLIC HEALTH ACT.**PIRATING.***See* COMPANY, 1.**PLEADING.***See* CRIMINAL LAW, 3—PUBLIC HEALTH ACT—SLANDER, 1.**POLICE MAGISTRATE.***See* ONTARIO TEMPERANCE ACT.**POSSESSION OF LAND.***See* VENDOR AND PURCHASER.**POWERS OF COMPANY.***See* COMPANY.**PRACTICE.***See* ARBITRATION AND AWARD — COMPANY, 5 — COSTS — DISCOVERY — DIVISION COURTS — EXECUTION — HUSBAND AND WIFE, 2 — JUDGMENT — LIBEL — REFERENCE — SLANDER, 1 — TRIAL—WRIT OF SUMMONS.**PREFERENCE.***See* ASSIGNMENTS AND PREFERENCES.**PRESCRIPTION.***See* ONTARIO TEMPERANCE ACT, 2.**PRINCIPAL AND AGENT.**

*Contract Made by Son in Respect of Father's Farm—Authority to Land Agents to Sell—Exclusive "Listing" for Defined Period—Sale during Period without Intervention of Land Agents—Action by Land Agents for Commission—Finding of Jury—Failure to Shew Ratification by Father—Absence of Full Knowledge—Right of Land Agents against Son.]—In order that a person may be deemed to have ratified an act done without his authority, it is necessary that at the time of the ratification he should have full knowledge of all the material circumstances in which the act was done, unless he intends to ratify the act and take the risk whatever the circumstances may have been.—In an action by land agents against a father and son to recover a commission upon the sale-price of the father's farm, it appeared that the son had "listed" the farm with the plaintiffs for sale, and had told his father that he had done so, but had not told him (as was the fact) that he had given the plaintiffs an exclusive authority to sell, good for 90 days. The father was satisfied with the "listing" having been made; but would not have approved the exclusive authority if he had known of it. The farm was in fact sold without the intervention of the plaintiffs, and not in consequence of their introducing the purchaser:—*Held*, that there*

PRINCL. & AGT.—(*Continued*).
 was no ratification of the son's act by the father.—*Held*, also, that the finding of the jury that the son, after consulting his father, became his agent, and therefore the father became responsible for the commission, was not a finding sufficient in the circumstances to warrant a verdict for the plaintiffs against the father.—*Held*, also, that the plaintiffs were not, on the pleadings and evidence, entitled to a judgment against the son; but the dismissal of the action as against him should be without prejudice to the plaintiffs bringing another action against him, based upon a contract by him to pay the commission in the event of a sale being made within 90 days. *Wheeler v. Hisey*, 654.

See **CONTRACT**, 3—**FRAUD AND MISREPRESENTATION** — **INSURANCE**, 1, 2, 4—**SALE OF GOODS**—**WRIT OF SUMMONS**, 1.

PRIORITIES.

See **ASSIGNMENTS AND PREFERENCES**.

PROCLAMATION.

See **MUNICIPAL CORPORATIONS**, 1.

PROMISE.

See **CONTRACT**, 3.

PROMISSORY NOTES.

See **COMPANY**, 4—**HUSBAND AND WIFE**, 6.

PROMOTERS.

See **COMPANY**, 3.

PROSPECTUS.

See **COMPANY**, 3.

PROVINCIAL BOARD OF HEALTH.

See **PUBLIC HEALTH ACT**.

PROVINCIAL LEGISLATURE.

See **DIVISION COURTS**, 1.

PROVINCIAL TREASURER.

See **WILL**, 1.

PUBLIC HEALTH ACT.

Person Employed in Lumber-camp—Liability of Employer for Expenses of Illness Contracted in Camp—R.S.O. 1914, ch. 218, sec. 118—Regulations Made by Provincial Board of Health—Contract with Physician—Oral Agreement—Sufficiency—Right of Father of Employee to Maintain Action—Costs—Scandalous Allegation in Statement of Defence.] — The plaintiff, the father of a boy who was employed by the defendants in a lumber-camp in one of the unorganised districts of Ontario, sued for the expenses incurred by him in providing medical care and attendance for his son, who contracted typhoid fever in the camp, alleging the default of the defendants in the failure to employ a duly qualified medical practitioner in the camp: sec. 118 of the Public Health Act, R.S.O. 1914, ch. 218:—*Held*, upon consideration of the provisions of sec. 118 and the regulations made thereunder by the Provincial Board of Health, that the defendants had not failed to employ a duly qualified medical practitioner, although their con-

P. HEALTH ACT—*(Continued).*

tract with the medical man employed by them at the time when the plaintiff's son became infected, was merely an oral one—a written contract was required by one of the regulations, but for a purpose which had no bearing upon the defendants' discharge of their duty to their employees.—The question whether, in any event, the plaintiff was a person who could maintain the action, was not considered.—The defendants, though successful, were deprived of costs because they had in their statement of defence made a baseless charge of theft against the plaintiff's son, which they had not withdrawn, and which was now ordered to be expunged as scandalous. *Unger v. Hettler Lumber Co.*, 538.

PUBLIC PARKS.

See MUNICIPAL CORPORATIONS, 1.

PUBLIC UTILITY.

See EXECUTION.

PUBLICATION.

See CRIMINAL LAW, 3—LIBEL
—MUNICIPAL CORPORATIONS, 2.

RAILWAY.

Highway Crossing—Negligence of Gateman—Injury to Vehicle Attempting to Cross Tracks—Evidence—Position of Gates—Findings of Jury—Contributory Negligence.] — The plaintiff's laden motor-truck was being driven by the plaintiff's servant southward upon a street in the city of H.; when it came to the line of the

RAILWAY—*(Continued).*

defendant's railway crossing that street, the gates which, under the authority of the Board of Railway Commissioners of Canada, had been placed on the north and south sides of the line, were or appeared to the driver to be up, and he attempted to cross; the truck passed under the north gate and got upon the track, where it was struck by an east-bound train; this action was brought to recover damages for injury to the truck and the goods it was carrying; and the jury (in answer to questions) found (1) negligence of the defendant, (2) "by not having the north gate lowered soon enough," and (3) no contributory negligence of the plaintiff's driver. The evidence as to the position of the gates was conflicting:—*Held*, in view of the evidence, that the meaning to be given to the jury's second answer was that they were unable to find that the south gate was up, but that they found that the north gate was not lowered when the truck reached it, and that this was an intimation to the driver that he might safely cross the tracks; that there was evidence to support this finding, and also the finding against contributory negligence; and the judgment for the plaintiff, upon the findings, should not be disturbed.—The leaving of the north gate open was evidence of negligence to go to the jury, and it was so even though with care and circumspection the driver of the truck might have been able to see at a distance the approach of the

RAILWAY—(Continued).

train which did the injury.—*North Eastern R.W. Co. v. Wanless* (1874), L.R. 7 H.L. 12, and *Smith v. South Eastern R.W. Co.*, [1896] 1 Q.B. 178, followed. *Armstrong Cartage and Warehouse Co. v. Grand Trunk R.W. Co.*, 660.

See EXECUTION — STREET RAILWAY.

RATIFICATION.

See CONTRACT, 3—PRINCIPAL AND AGENT.

REFERENCE.

Order Referring whole Action for Trial—Judicature Act, sec. 65 (c) — “Matters of Account” — Claim as upon Contract for Value of Water Wrongfully Taken — Basis of Payment.—The plaintiff board, waiving the tort, claimed in this action the value of water wrongfully and fraudulently taken by the defendant company from the plaintiff board's mains. The defendant company submitted to pay what might be found due, and raised several contentions as to the basis upon which payment should be made:—*Held*, that, the matters in dispute being “wholly or partly matters of account,” an order referring the whole action to an Official Referee for trial, was properly made under sec. 65 (c) of the Judicature Act, R.S.O. 1914, ch. 56. *Oshawa Board of Water Commissioners v. Robson Leather Co. Limited*, 635.

REMAINDER.

See WILL, 7.

RESCISSION.

See FRAUD AND MISREPRESENTATION.

RESIDUE.

See WILL, 3, 4.

RIVER.

See WATER.

RULES.

(Consolidated Rules of the Supreme Court of Ontario, 1913.)

Rule 2.—See COSTS, 4.

Rule 23.—See WRIT OF SUMMONS, 1.

Rule 25 (1) (h).—See WRIT OF SUMMONS, 2.

Rule 183.—See INDEMNITY.

Rule 252.—See TRIAL.

Rule 304.—See HUSBAND AND WIFE, 2.

Rule 328.—See DISCOVERY.

Rule 373 (b).—See COSTS, 1.

Rule 649.—See COMPANY, 1.

SALARY.

See COMPANY, 1, 2.

SALE OF GOODS.

Unfitness of Goods for Purpose of Purchaser—Knowledge of Purpose — Rejection of Part of Goods only—Misrepresentation by Vendor's Agent — Reliance upon Judgment of Agent — Implied Warranty or Condition of Fitness — Breach—Right to Reject Part—General Damages—Special Damage—Damages in Respect of Quality of Goods Retained.—The defendants, manufacturers of clothing which they shipped by express to customers at a distance, ordered from the plaintiffs 19,000 paper boxes for use in their busi-

SALE OF GOODS—(Continued). ness. The plaintiffs made and delivered to the defendants 8,500 boxes. The defendants used some of these, and then, finding they were not strong enough for their purpose, returned to the plaintiffs what remained on hand, except so many as they thought they would need until supplied with more suitable boxes—sending the plaintiffs a cheque for the price of the boxes used or retained. The plaintiffs refused to accept the cheque or to acknowledge the defendants' right to reject, and sued for the price of the 8,500 boxes delivered and for damages for breach of contract. Before the defendants gave the order for the boxes they were visited by a salesman (S.) sent by the plaintiffs, to whom they described the purpose for which the boxes were needed. S. left with the defendants specimens of the plaintiffs' boxes, and assured the defendants that these were suitable for their purpose. He also made a representation which was not correct and was misleading. The defendants accepted S.'s assurance, and, relying upon his judgment, gave him the order. As soon as the defendants began to use the boxes, it became apparent that they were not fit for use as containers of clothes sent by express to distant places:—*Held*, that, while S.'s misrepresentation was not fraudulent, it was a material representation inducing the contract, and S. was the man put forward by the plaintiffs to negotiate the contract; so that the defendants

SALE OF GOODS—(Continued). were entitled to repudiate, upon learning the facts; but this right to repudiate was a right to repudiate the contract as a whole—the defendants could not affirm as to part, as they did by retaining some of the goods, and repudiate as to the remainder.—(2) That there was an implied condition that the goods should be fit for the purpose; and, that condition being broken, the defendants had the right to reject the goods.—(3) That the sale was not a "sale by sample;" the implied condition attaches upon the sale of an article like the one exhibited; so, even if the boxes delivered were as good as the ones exhibited, the defendants had the right to reject; in the case of the sale of a number of articles, each one of which must be of the kind and quality ordered, the purchaser is not bound to reject or retain all; and therefore the defendants were entitled to accept some, as they did, and to reject the others.—*Molling and Co. v. Dean and Son Limited* (1901), 18 Times L.R. 217, followed.—(4) That the defendants could not have general damages arising from the breach of the condition in respect of the goods rejected—such general damages are recoverable only where the property has passed; and there was no evidence of special damage in respect of the boxes returned.—(5) That the only damages recoverable by the defendants were such as, treating the stipulation as to quality as a warranty, they could prove that they had sus-

SALE OF GOODS—(*Continued*).
 tained by breach of that stipulation in respect of the boxes used or retained. — A judgment in favour of the plaintiffs for the recovery of a sum representing the value of the boxes used or retained, was affirmed, with a slight variation in the amount; subject to a set-off in favour of the defendants of the amount of such damages as they could prove (upon a reference at their own risk) that they had sustained by breach of the stipulation mentioned above (5)—LENNOX, J., dissenting as to this.—*Per* LENNOX, J.—A litigant should not be allowed, after he is aware of all the facts, to adopt a contract in part and repudiate it in part. *Dominion Paper Box Co. Limited v. Crown Tailoring Co. Limited*, 249.

See CONTRACT, 1, 2.

SALE OF LAND.

See COMPANY, 3—CONTRACT, 3—FRAUD AND MISREPRESENTATION—MORTGAGE, 1—PRINCIPAL AND AGENT—VENDOR AND PURCHASER.

SCANDAL.

See PUBLIC HEALTH ACT.

SEAL.

See COMPANY, 4—TELEPHONE COMPANY.

SECURITY.

See MORTGAGE.

SECURITY FOR COSTS.

See COSTS, 1.

SEDITIONOUS LIBEL.

See CRIMINAL LAW, 3.

SEPARATE ESTATE.

See HUSBAND AND WIFE, 4.

SERVICE OF PROCESS.

See WRIT OF SUMMONS.

SET-OFF.

See CONTRACT, 3.

SETTLEMENT.

See TRUSTS AND TRUSTEES.

SHARES AND SHAREHOLDERS.

See COMPANY, 3—EXECUTORS AND ADMINISTRATORS, 2—WRIT OF SUMMONS, 2.

SHERIFF.

See COMPANY, 6.

SILENCE.

See CONTRACT, 1, 2.

SLANDER.

1. *Defence* — *Justification* — *Particulars* — *Discovery* — *Order for Better Particulars* — *Affidavit Verifying* — *Practice*.] — Where the defendant in an action for slander pleads justification, he must state in his plea, or in particulars delivered to supplement the plea, the facts upon which he relies for justification; and, until such particulars are given, the defendant is not entitled to examine the plaintiff for discovery. The plaintiff is not bound to make affidavit of denial before he call upon the defendant for particulars. — *Zierenberg v. Labouchere*, [1893] 2, Q.B. 183, and *Arnold & Buller v. Bottomley*,

SLANDER—(Continued).

[1908] 2 K.B. 151, followed.—Where an order was made requiring the defendant to deliver particulars of a plea of justification, and the particulars delivered did not comply with that order, an order was made setting aside the particulars delivered, with liberty to the defendant to deliver new particulars, verified by his oath, that they “are to the best of his belief true and as full and accurate as he can make them in view of the knowledge he now has.” *Henneforth v. Maloof*, 36.

2. *Imputing Unchastity to Young Girl—Damages—Failure to Prove Special Damage—Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 19 (1)—Evidence of Illness and Loss of Hospitality—Insufficiency—Repetition of Slander—Nominal Damages—Costs—Appeal—Misconduct of Defendant.*—In an action (brought in a County Court) for a slander imputing to the plaintiff, a young girl, unchastity, “meaning thereby that the said plaintiff was a girl of unchaste character,” the jury found a verdict for the plaintiff for \$500, and judgment for that sum and costs was given in favour of the plaintiff:—*Held*, upon appeal, that, no special damage having been proved, only nominal damages could be recovered: *Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 19 (1)*.—*Whitting v. Fleming* (1908), 16 O.L.R. 263, approved. — After verdict, where the proof is sufficient to connect the plaintiff with a charge imputing a crime,

SLANDER—(Continued).

proof of special damage is not necessary; but the plaintiff could not avail herself of the imputation of a crime with which she was not charged.—Where special damage is alleged, it must be strictly proved; it was not proved that the plaintiff had become ill from the effects of the slander: if illness or loss of hospitality was caused by reason of the slander, it was by the repetition thereof, for which the defendant was not responsible. Special damage from repetition is too remote. Each publication is a distinct tort, and every person repeating the slander becomes an independent slanderer. It did not appear that the plaintiff was present when the slander was uttered, and it was not uttered in the presence of any person immediately concerned and under moral obligation to repeat it; nor did the defendant request those to whom he spoke, or intend or desire them, to repeat the slander.—The evidence did not support the allegation of loss of hospitality. — Review of the authorities.—The damages were reduced to nominal damages, but the plaintiff was allowed her full costs in the County Court, without set-off; and the defendant, although successful upon the appeal, was allowed no costs of it, because of his misconduct in making a groundless attack upon the plaintiff’s character.

Stewart v. Sterling, 477.

SOLICITOR.

See COSTS, 2, 3.

SPECIAL DAMAGE.

See SALE OF GOODS—SLANDER,
2.

STATED CASE.

See ARBITRATION AND AWARD.

STATUTE OF FRAUDS.

See CONTRACT, 1, 2, 3.

STATUTE OF LIMITATIONS.

See EXECUTORS AND ADMINISTRATORS, 2 — HUSBAND AND WIFE, 5.

STATUTES.

30 & 31 Vict. ch. 3, sec. 91 (24) (Imp.)
(British North America Act).

See DIVISION COURTS, 1.

55 Vict. ch. 99, sec. 25 (O.) (Incorporating the Toronto Railway Company).

See STREET RAILWAY, 1.

R.S.O. 1897, ch. 33, sec. 1 (Trespasses to Public Lands).

See TELEPHONE COMPANY.

60 Vict. ch. 93, sec. 15 (O.) (Metropolitan Street Railway Company).

See STREET RAILWAY, 2.

63 Vict. ch. 102, sec. 5 (O.) (City of Toronto).

See STREET RAILWAY, 1.

3 Edw. VII. ch. 19, secs. 331, 559 (O.)
(Municipal Act).

See TELEPHONE COMPANY.

3 Edw. VII. ch. 19, sec. 576 (1) (O.)

See MUNICIPAL CORPORATIONS, 1.

6 Edw. VII. ch. 34, sec. 20 (O.)
(Amending Municipal Act).

See TELEPHONE COMPANY.

R.S.C. 1906, ch. 37, secs. 46, 56 (Railway Act).

See EXECUTION.

R.S.C. 1906, ch. 81, sec. 102 (Indian Act).

See DIVISION COURTS, 1.

R.S.C. 1906, ch. 139, sec. 2 (e) (Supreme Court Act).

See JUDGMENT.

R.S.C. 1906, ch. 144 (Winding-up Act).

See COMPANY, 5.

R.S.C. 1906, ch. 144, secs. 33, 84, 133.

See COMPANY, 6.

R.S.C. 1906, ch. 146, secs. 132, 133, 134,
852, 853, 855, 859, 860, 861
(Criminal Code).

See CRIMINAL LAW, 3.

STATUTES—(Continued).

9 Edw. VII. ch. 26, sec. 42 (O.) (Funds Given to Province for Charitable or Educational Purposes).

See WILL, 1.

10 Edw. VII. ch. 26, sec. 47 (O.)
(Amending 9 Edw. VII. ch. 26,
sec. 42).

See WILL, 1.

2 Geo. V. ch. 38, secs. 8 (1), 39 (O.)
(Amending Municipal Act).

See TELEPHONE COMPANY.

3 & 4 Geo. V. ch. 9, secs. 43, 53, 125,
130 (D.) (Bank Act).

See EXECUTORS AND ADMINISTRATORS, 2.

3 & 4 Geo. V. ch. 51, sec. 1 (D.)
(Amending Supreme Court Act).

See JUDGMENT.

R.S.O. 1914, ch. 1, sec. 28 (i) (Interpretation Act).

See MUNICIPAL CORPORATIONS, 3.

R.S.O. 1914, ch. 56, sec. 43 (Judicature Act).

See ARBITRATION AND AWARD.

R.S.O. 1914, ch. 56, sec. 65 (c).

See REFERENCE.

R.S.O. 1914, ch. 63, secs. 106, 125
(Division Courts Act).

See DIVISION COURTS, 2.

R.S.O. 1914, ch. 63, secs. 190 *et seq.*

See DIVISION COURTS, 1.

R.S.O. 1914, ch. 65, sec. 29 (Arbitrations Act).

See ARBITRATION AND AWARD.

R.S.O. 1914, ch. 71, sec. 19 (1) (Libel and Slander Act).

See SLANDER, 2.

R.S.O. 1914, ch. 75 (Limitations Act).

See EXECUTORS AND ADMINISTRATORS, 2.

R.S.O. 1914, ch. 75, sec. 47 (2).

See HUSBAND AND WIFE, 5.

R.S.O. 1914, ch. 102 (Statute of Frauds).

See CONTRACT, 1, 2, 3.

R.S.O. 1914, ch. 109, sec. 15 (Conveyancing and Law of Property Act).

See VENDOR AND PURCHASER.

R.S.O. 1914, ch. 112, sec. 2 (d) (Mortgages Act).

See MORTGAGE, 2.

R.S.O. 1914, ch. 116 (Short Forms of Leases Act).

See ASSIGNMENTS AND PREFERENCES.

R.S.O. 1914, ch. 116, sched. B, No. 12.

See LANDLORD AND TENANT, 3.

R.S.O. 1914, ch. 119, secs. 13, 14, 15,
19, 21, 23 (Devolution of Estates Act).

See WILL, 7.

STATUTES—(Continued).

- R.S.O. 1914, ch. 120, secs. 2, 12 (2), 14, 30 (Wills Act).
See INSURANCE, 3.
 R.S.O. 1914, ch. 120, sec. 27.
See WILL, 3, 5.
 R.S.O. 1914, ch. 121, sec. 41 (Trustee Act).
See EXECUTORS AND ADMINISTRATORS, 1.
 R.S.O. 1914, ch. 121, secs. 44, 49.
See WILL, 7.
 R.S.O. 1914, ch. 121, sec. 58.
See WILL, 4.
 R.S.O. 1914, ch. 135, sec. 2 (b) (Bills of Sale and Chattel Mortgage Act).
See CHATTEL MORTGAGE.
 R.S.O. 1914, ch. 140, secs. 6, 16, 37 (3) (Mechanics and Wage-Earners Lien Act).
See MECHANICS' LIENS.
 R.S.O. 1914, ch. 147, secs. 5 (1), 6 (1) (Assignments and Preferences Act).
See ASSIGNMENTS AND PREFERENCES.
 R.S.O. 1914, ch. 149, secs. 4, 7 (Married Women's Property Act).
See HUSBAND AND WIFE, 4, 5.
 R.S.O. 1914, ch. 151 (Fatal Accidents Act).
See EXECUTORS AND ADMINISTRATORS, 1—NEGLIGENCE, 1.
 R.S.O. 1914, ch. 155, secs. 19, 20, 78 (2) (Part III.) (Landlord and Tenant Act).
See LANDLORD AND TENANT, 3.
 R.S.O. 1914, ch. 178, secs. 23 (1) (a), (i), 210 (Companies Act).
See COMPANY, 4.
 R.S.O. 1914, ch. 178, sec. 92.
See COMPANY, 1.
 R.S.O. 1914, ch. 178, secs. 99 *et seq.*
See COMPANY, 3.
 R.S.O. 1914, ch. 183, secs. 2 (14), 155 (Insurance Act).
See INSURANCE, 2.
 R.S.O. 1914, ch. 183, sec. 171 (5).
See INSURANCE, 3.
 R.S.O. 1914, ch. 183, sec. 194, condition 5.
See INSURANCE, 1.
 R.S.O. 1914, ch. 186, secs. 21, 22 (Ontario Railway and Municipal Board Act).
See STREET RAILWAY, 1.
 R.S.O. 1914, ch. 186, secs. 21 (1), 22, 23 (2), 48 (1), 49.
See STREET RAILWAY, 2.
 R.S.O. 1914, ch. 192, secs. 2 (o), 150, 263 (Municipal Act).
See MUNICIPAL CORPORATIONS, 2.

STATUTES—(Continued).

- R.S.O. 1914, ch. 192, sec. 288 (1) (a).
See MUNICIPAL CORPORATIONS, 3.
 R.S.O. 1914, ch. 197 (Municipal Franchises Act).
See TELEPHONE COMPANY.
 R.S.O. 1914, ch. 207, sec. 11 (2) (Motor Vehicles Act).
See NEGLIGENCE, 1.
 R.S.O. 1914, ch. 207, sec. 23.
See NEGLIGENCE, 2.
 R.S.O. 1914, ch. 218, sec. 118 (Public Health Act).
See PUBLIC HEALTH ACT.
 R.S.O. 1914, ch. 261, secs. 2 (c), 14 (Cemetery Act).
See WILL, 9.
 5 Geo. V. ch. 20, sec. 25 (O.) (Funds Given to Province for Charitable or Educational Purposes).
See WILL, 1.
 5 Geo. V. ch. 22, sec. 2 (1) (a) (O.) (Mortgagors and Purchasers Relief Act).
See MORTGAGE, 2.
 5 Geo. V. ch. 76 (O.) (City of Toronto).
See MUNICIPAL CORPORATIONS, 1.
 6 Geo. V. ch. 35, sec. 6 (O.) (Companies Amendment Act, 1916).
See COMPANY, 4.
 6 Geo. V. ch. 50, secs. 2 (i) (i.), 41 (1) (O.) (Ontario Temperance Act).
See ONTARIO TEMPERANCE ACT, 1.
 6 Geo. V. ch. 50, sec. 51 (O.)
See ONTARIO TEMPERANCE ACT, 2.
 6 Geo. V. ch. 96, sec. 2 (O.) (City of Toronto).
See MUNICIPAL CORPORATIONS, 1.
 7 Geo. V. ch. 50, sec. 18 (O.) (Ontario Temperance Amendment Act, 1917).
See ONTARIO TEMPERANCE ACT, 2.
 7 Geo. V. ch. 92, sec. 4 (1) (7) (O.) (City of Toronto).
See STREET RAILWAY, 2.

STAY OF EXECUTION.

See COSTS, 4—EXECUTION.

STAY OF PROCEEDINGS.

See MORTGAGE, 2.

STREAM.

See WATER.

STREET RAILWAY.

1. *Agreement with City Corporation—Construction—55 Vict. ch. 99, sec. 25 (O.)—Claim of*

STREET RY.—(Continued).

City Corporation to Recover Moneys Expended in Removing Snow and Ice from Railed Streets of City—Liability of Street Railway Company—Jurisdiction of Court—Exclusive Jurisdiction of Ontario Railway and Municipal Board—Ontario Railway and Municipal Board Act, secs. 21, 22—63 Vict. ch. 102, sec. 5 (O.)—Interest.]—Held, that the Court had jurisdiction to entertain an action to recover a sum which the city corporation, the plaintiff, alleged it was compelled to expend in removing snow and ice from certain streets of the city in consequence of a breach of contract and negligence on the part of the defendant company.—It was not a case in which the Ontario Railway and Municipal Board had exclusive jurisdiction, under sec. 22 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186. The corporation was not compelled to make an application to the Board, under sec. 21, for redress in respect of something that the company ought to have done and failed to do.—Section 5 of an Act “respecting certain matters pertaining to the City of Toronto,” 63 Vict. ch. 102 (O.), is not repealed by the Ontario Railway and Municipal Board Act.—And held, upon consideration of the provisions of sec. 25 of the Act incorporating the Toronto Railway Company, 55 Vict. ch. 99 (O.), and of conditions 21 and 22 of the agreement of the 1st September, 1891, as construed by sec. 25, that the

STREET RY.—(Continued).

company had not carried out the obligations imposed upon it with regard to the removal of snow and ice; and that the corporation was entitled to recover the sum expended by it in doing what the company ought to have done, and also interest on that sum. *City of Toronto v. Toronto R.W. Co.*, 603.

2. *Expropriation of Portion by City Corporation—Special Act, 7 Geo. V. ch. 92, sec. 4 (1) (O.)—Claim of County Corporation for Damages under sub-sec. (7) — Disallowance by Ontario Railway and Municipal Board—Right of Appeal—Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 48 (1) —Leave to Appeal—Jurisdiction of Appellate Division of Supreme Court of Ontario—Rights of County Corporation—Transfer of Highway to Minor Municipalities—Agreement between County Corporation and Railway Company—60 Vict. ch. 93, sec. 15 (O.)—Statutes and By-laws.]—By an Act passed in 1917, 7 Geo. V. ch. 92 (O.), the city corporation was (sec. 4 (1)) authorised to acquire the portion of the railway upon Y. street, within the city limits, paying compensation, to be determined by the Ontario Railway and Municipal Board, “subject to either party”—i.e., the city corporation or the railway company—“having the right to one appeal.” By sec. 4 (7), if the county corporation made any claim against the city corporation by reason of the*

STREET RY.—(Continued).

exercise of the powers conferred by sec. 4, the claim was to be adjudicated upon by the Board; but no right of appeal was given by the statute to the county corporation. A claim was made by the county corporation and disallowed by the Board, on questions of law; and the county corporation applied to a Divisional Court of the Appellate Division, under sec. 48 (1) of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 48 (1), for leave to appeal:—*Held*, that the provisions of sec. 48 (1) applied to the jurisdiction given to the Board by other statutes (such as the Act of 1917): see secs. 21 (1), 22, 23 (2), 49, of ch. 186; although a right of appeal was expressly conferred upon the other parties by sec. 4 (1) of the Act of 1917, the maxim *expressio unius est exclusio alterius* did not apply; and the Court had jurisdiction to give the county corporation leave to appeal.—The Board declined to hear evidence offered by the county corporation, upon the ground that it had abandoned the York roads and transferred them to minor municipalities of the county, and had thereby ceased to have any claim for damages under the Act of 1917; and upon the ground that the county corporation had no such interest under the agreement of the 6th April, 1894, as to give it any right “in gross” to damages:—*Held*, that the agreement of 1894 was not simply validated by the statute of

STREET RY.—(Continued).

1897, 60 Vict. ch. 93; by sec. 15, the privileges and franchises created by the agreement were made existent and valid to the same extent and in the same manner as if set out and enacted as part of the Act; the rights of the county corporation did not depend upon ownership of the highway; and they were not divested by any statute or by-law.—Leave to appeal was granted, the appeal was allowed, and it was ordered that the county corporation should be permitted by the Board to give evidence in support of the claim made. *Re City of Toronto and Toronto and York Radial R.W. Co. and County of York*, 545.

See EXECUTION.

SUBROGATION.

See COSTS, 2.

SUMMARY PROCEEDINGS.

See LANDLORD AND TENANT, 3.

SUPREME COURT OF CANADA.

See JUDGMENT.

SUPREME COURT OF ONTARIO.

See EXECUTION—STREET RAILWAY.

SURRENDER.

See LANDLORD AND TENANT, 3.

TAXATION OF COSTS.

See COSTS, 2, 3, 4.

TELEPHONE COMPANY.

Powers of—Right to Maintain Poles and Wires in Streets of

TELEPHONE CO.—(Continued).

*Town—Company Incorporated in 1905 by Charter Issued under Ontario Companies Act—Seal of Province—Charter Preceding Incorporation of Town—Rights under Charter—Act to Prevent Trespasses to Public Lands, R.S.O. 1897, ch. 33, sec. 1—Agreement with Town Corporation—Permission to Use Streets—Monopoly for Five Years—Municipal Act, 1903, secs. 331, 559—6 Edw. VII. ch. 34, sec. 20 — 2 Geo. V. ch. 38, secs. 8 (1), 39—Municipal Franchises Act, R.S.O. 1914, ch. 197.]—A telephone company has not the right to plant poles upon a highway without sanction derived from the Legislature or from Parliament.—*Domestic Telegraph Co. v. Newark* (1887), 49 N.J. Law 344, 346, approved.—A charter creating a company confers upon it the powers of a natural person so far as such powers are enumerated. A company which has power under its charter to own and operate a telephone line has no right to exercise that power until it acquires it in accordance with the general law of the land.—Until a date subsequent to the making of a certain agreement, the defendants' council had no power beyond that conferred by sec. 331 of the Municipal Act, 1903; and, under that section, the right to operate as a monopoly for the period of five years could alone have been given.—Section 559 of the Municipal Act, 1903, sec. 20 of 6 Edw. VII. ch. 34, and secs. 8 (1) and 39 of 2 Geo. V. ch. 38, considered.*

TELEPHONE CO.—(Continued).

—The charter of the company, issued under the Companies Act, was not issued by the action of the Legislature; nor could it be regarded as a grant of Crown property. Any such grant must be, not under the seal of the Province, but under the hand and seal of the Lieutenant-Governor: sec. 1 of an Act to Prevent Trespasses to Public Lands, R.S.O. 1897, ch. 33.—The whole scheme of the Companies Act is to confer power upon the companies chartered, and it gives no right to those issuing the charter to deal with the rights of the public upon highways or to interfere with the public domain.—The provisions of the Municipal Franchises Act, R.S.O. 1914, ch. 197, do not apply to a telephone company.—The plaintiff company had not established a right to continue to maintain and operate its lines upon the streets of the town. *Temiskaming Telephone Co. Limited v. Town of Cobalt*, 385.

TEMPERANCE.

See ONTARIO TEMPERANCE ACT.

TENANT.

See LANDLORD AND TENANT.

TERMINATION OF LEASE.

See LANDLORD AND TENANT, 3.

THREATS.

See HUSBAND AND WIFE, 6.

TIME.

See CONTRACT, 1, 2—COSTS, 3

—HUSBAND AND WIFE, 3.

TITLE TO LAND.

See VENDOR AND PURCHASER.

TRADE PUBLICATION.

See COMPANY, 1.

TRIAL.

Adjournment—Notice of Trial
—Rule 252—*Notice for Wrong*
Sittings Accepted—Notice for Proper
Sittings—Defendant not Ap-
pearing—Judgment for Plaintiffs
—*Order Setting aside—Irregular-*
ity—Practice.—Where an action
comes on for trial at a sittings,
and the trial is at that sittings
peremptorily adjourned till a
later sittings, a new notice of trial
for the later sittings is necessary:
Rule 252.—A countermand of a
notice of trial is not regular.—
Friendly v. Carter (1881), 9 P.R.
41, approved.—Where the trial
had been adjourned to the June
sittings, and the plaintiffs (by
mistake) gave notice of trial for
the October sittings, and the
action was entered for trial at
the October sittings, but the
plaintiffs, without formally
countermanding their notice for
the later sittings—and without
any motion being made by either
party—gave notice of trial for
the June sittings, and caused the
entry for trial to be correspond-
ingly changed:—*Held*, that the
defendant had accepted the
plaintiffs' notice of trial for the
October sittings, and, without an
order setting it aside, the plain-
tiffs were bound by it; and a
judgment for the plaintiffs pro-
nounced at the June sittings, the
defendant not appearing, was set
aside. *Malden Public School*
Board (Section 5) v. Sellers, 14.

TRIAL—(Continued).

See COSTS, 3—CRIMINAL LAW
—INDEMNITY—NEGLIGENCE, 1
—REFERENCE.

TRUSTEE ACT.

See EXECUTORS AND ADMINIS-
TRATORS, 1—WILL, 4, 7.

TRUSTS AND TRUSTEES.

Mortgage Held by Trustee-cor-
poration for Beneficiaries under
Marriage Settlement—Vested in-
terest of Beneficiaries—Right to
Take Property in Specie—Assign-
ment of Mortgage to Accountant of
Court—Compensation of Trustee
—*Arbitrary Percentage.*—A trust
corporation, trustee under a mar-
riage settlement, had in its hands,
as a part of the trust estate, a
certain mortgage for a large sum.
The shares of the beneficiaries,
infant and adult, under the settle-
ment, had been declared to be
vested and not subject to be
divested:—*Held*, that the trustee-
corporation could not insist upon
retaining the mortgage until com-
plete realisation: the beneficiaries
could elect to take it in specie;
and, upon their application, the
corporation was ordered to assign
the mortgage to the Accountant
of the Supreme Court of Ontario
to hold in trust for them.—Re-
marks upon the vicious system
by which a trustee is allowed an
arbitrary percentage upon the
money which passes through his
hands. *Re Hughes*, 345.

See COMPANY, 3—EXECUTORS
AND ADMINISTRATORS—HUSBAND
AND WIFE, 5—WILL, 1, 4, 7, 9.

ULTIMATE NEGLIGENCE.

See NEGLIGENCE, 2.

UNDERTAKING.

See CONTRACT, 3—LIBEL.

VEHICLES.

See NEGLIGENCE—RAILWAY.

VENDOR AND PURCHASER.

*Agreement for Sale of Land—Title — “Title by Possession,” Meaning of — Identification of Land Described in Agreement with Land as Described in Conveyances to Vendor and Predecessors in Title—Parol Evidence—Admissibility—Effect of Evidence—Good Paper Title Shewn—Strip of Land not Forming Part of Lots Mentioned in Former Conveyance—Appurtenance—Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 15.]—A title which depends at any point upon possession under the Statute of Limitations, and so is not wholly a paper title, is a title by possession.—Parol evidence was held, admissible to shew that “lots 3 and 4” was the name of the whole parcel occupied by the vendor and his predecessors in title, and was the property described in an agreement of sale and purchase; and the acts of the parties might be given in evidence to interpret the description in the conveyance.—*Waterpark v. Fennell* (1859), 7 H.L.C. 650; *Lyle v. Richards* (1866), L.R. 1 H.L. 222; and *Van Diemen’s Land Co. v. Marine Board of Table Cape*, [1906] A.C. 92, followed.—The evidence established that for upwards of 29 years the block of land described in the*

VENDOR & PUR.—(Continued).

agreement had been occupied as and for lots 3 and 4 by J. and son, first as tenants and then as owners; that the block was wholly enclosed either by buildings or walls; that the lands were so occupied by J. and son and their successors as of supposed right, and not as trespassers or intruders; and that the whole of the land described in the agreement was land to which the vendor had a paper title under conveyance to him of lots 3 and 4.—And *semble*, that, if the westerly strip did not form part of lots 3 and 4, nevertheless under sec. 15 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, the whole of the land described in the agreement passed to the predecessors of the vendor as lots 3 and 4 and hereditaments appurtenant thereto.—*McNish v. Munro* (1875), 25 U.C.C.P. 290, and *Hill v. Broadbent* (1898), 25 A.R. 159, distinguished. — *Willis v. Watney* (1881), 45 L.T.R. 739, *Winfield v. Fowlie* (1887), 14 O.R. 102, and *Fraser v. Mutchmor* (1904), 8 O.L.R. 613, followed.—Finding of a Referee in favour of the vendor’s title affirmed. *Re Brenzel and Rabinovitch*, 394.

See CONTRACT, 3—FRAUD AND MISREPRESENTATION — MORTGAGE, 1.

VERDICT.

See CRIMINAL LAW, 3.

VESTED INTEREST.

See TRUSTS AND TRUSTEES.

VOLUNTARY STATEMENTS.

See CRIMINAL LAW, 2.

—
WAIVER.

See CONTRACT, 3 — HUSBAND AND WIFE, 1—INSURANCE, 4—LANDLORD AND TENANT, 3 — MUNICIPAL CORPORATIONS, 1.

—
WARRANTY.

See LANDLORD AND TENANT, 2
 —SALE OF GOODS.

—
WATER.

*Erection of Dam in River—Maintenance and Operation Causing Injury to Owners and Occupants of Lands above Dam—Overflow of Water Retained and Stored—High Water-level—Neglect to Use Means to Reduce—Excessive Rainfall—Act of God—Action for Damages—Status of Plaintiffs—Occupants in Possession of Land—Power Company—Charter of Incorporation—Agreement with Government of Ontario—Damages.]—It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable.—*Greenock Corporation v. Caledonian R.W. Co.*, [1917] A.C. 556, followed.—By means of a dam constructed and operated by one of the defendant companies on the Rainy river at Fort Frances, the waters of the river and of Rainy lake were retained*

WATER—(Continued).

and stored for the defendants' purposes:—*Held*, upon the evidence, that, while the abnormally high water in the lake in the spring and summer of 1916 was not due solely to the defendants or to those controlling the dam, there were in the early part of the year, to the knowledge of those operating the dam, indications that the water-level would be high, and the probabilities of danger were increased by the positive actions of those operating the dam: (1) in holding back and storing immense quantities of water, filling up what would otherwise have been a receptacle for a like quantity of water produced by the spring freshets or excessive rainfall; and (2) in their persistent refusal and neglect to open the sluice-gates and wasteways of the dam, which, if opened, would have drawn down large quantities of water.—The events which happened when the plaintiffs suffered damage were not attributable to the act of God so as to relieve those who controlled and operated the dam.—Certain of the plaintiffs were not the owners, but merely the occupants, of portions of the lands damaged, but their possession was sufficient to enable them to maintain the action.—The Ontario company defendant had no right, by virtue of its charter of incorporation or its agreement with the Government of Ontario or otherwise, to back up the water to the extent to which it was backed in 1916, nor was it privileged to disregard the rights

WATER—(Continued).

of owners or occupants above the dam. *Smith v. Ontario and Minnesota Power Co. Limited*, 167.

See REFERENCE.

WILL.

1. *Bequest of Fund to Provincial Treasurer—Permanent Endowment of Charity—Income to be Paid over in Perpetuity—Legal Effect—Gift of Corpus to Charity—Trustee—Ontario Statutes*, 9 Edw. VII. ch. 26, sec. 42; 10 Edw. VII. ch. 26, sec. 47; 5 Geo. V. ch. 20, sec. 25.]—C., who died in 1913, by his will made in 1910, directed that all his estate, save that specifically dealt with, should be converted by his executors, and the proceeds paid to the Provincial Treasurer, under the provisions of the Ontario statute 9 Edw. VII. ch. 26, sec. 42, as amended by 10 Edw. VII. ch. 26, sec. 47, "for the permanent endowment of . . . a charitable object as hereinafter directed" and "shall be so paid for the purpose of being invested by him in Ontario Government stock as by the aforesaid Acts directed and the whole of the interest thereon shall be paid over as it matures in perpetuity to the Hospital for Sick Children."—*Held*, that the gift of the income in perpetuity, without any restriction as to the purpose for which it was to be used, was in effect and in law a gift of the corpus.—*Mayor etc. of Beverley v. Attorney-General* (1857), 6 H.L.C. 310, 318, followed.—The inten-

WILL—(Continued).

tion of the testator must always be the guide in the interpretation of wills; but, when once the intention is clear, the legal effect of that intention must follow even if it could be shewn that the testator did not know the effect in law of what he had directed.—The statutes (since repealed and re-enacted in amended form by 5 Geo. V. ch. 20, sec. 25) merely constituted the Treasurer a trustee—the effect of the trust declared must be ascertained upon the ordinary principles. *Re Carter*, 57.

2. *Construction — Bequest of Annuity Charged on Land — Specific Pecuniary Legacies—Out of what Property Payable—Whether Charged on Land—Specific and Residuary Legacies—Description of Property as "in England" and "in Canada."*—The estate of the testator, who died in England, consisted of two small sums of money in England, a considerable sum in a bank in Ontario, and valuable real estate in Ontario. By his will he appointed an executor, and gave him \$1,000. He gave his cousin in England (who predeceased him) an annuity of \$600, to be provided from the rents of the real estate in Ontario—"my nephews to whom . . . I bequeath that property contributing *this charge* in such proportion as they shall mutually agree or . . . as my executor shall deem just." He then gave to the same cousin all his property in England. Then follow-

WILL—(Continued).

ed a legacy of \$5,000 to his niece; and then — “Subject to the above-mentioned charges, I give . . . to my nephews . . . my real property” in Ontario. There were two nephews; to one three-fifths of the property was given and to the other two-fifths. Lastly, he directed that “all other property than the above-mentioned which I possess in Canada” should be divided equally between three named persons:—*Held*, that, though the annuity was made a charge upon the real estate, the legacies of \$1,000 and \$5,000, notwithstanding the use of the plural in the words “subject to the above-mentioned charges,” were not so made a charge.—The bequest of the property in England was a specific legacy. The residuary bequests were not specific, and had not priority over the pecuniary legacies of \$1,000 and \$5,000.—A gift of “my property at A.” is specific. The words “in Canada” at the end of the residuary bequest were not added with the view of making the gift specific, but because all in England had already been given. *Re Newcombe*, 590.

3. *Construction — Bequest of Residue to Younger Daughter—Small Residue when Will Made—Estate Largely Increased at Death of Testatrix—Will Speaking as if Made Immediately before Death—Wills Act, R.S.O. 1914, ch. 120, sec. 27—“Unless a Contrary Intention Appears by the Will”—Residue of “Moneys or Securities*

WILL—(Continued).

for Money”—Residuary Legatee Entitled to both—“Or”—“And.”]—The testatrix died in January, 1917; her last will, which was proved, was made in 1906. Her husband predeceased her, dying in October, 1916; by his will, made in 1902, he left all his property to her. When the testatrix made her will in 1906, her property was of about the value of \$400; at the time of her death, by reason of her husband’s death and bequest, the value of her property was more than \$10,000. She had three children; by her will she left small sums and certain chattels to her elder daughter and her son; to the younger daughter she left certain chattels and “all the rest residue and remainder of the moneys or securities for money I may die possessed of.”—*Held*, that, although the effect of making the will speak as if made immediately before the death (Wills Act, sec. 27) was greatly to increase the benefit conferred by the gift to the younger daughter, it could not be said that a contrary intention appeared by the will; and, therefore, the younger daughter took the bulk of the estate under the will.—Principles deducible from the cases bearing upon the application of the statute stated.—*Everett v. Everett* (1877), 7 Ch. D. 428, 433, 434, and *Vansickle v. Vansickle* (1884), 9 A.R. 352, 354, specially referred to.—*Held*, also, that the gift of the residue of “moneys or securities for money” was one; the younger daughter was not put to her

WILL—(Continued).

election between "moneys" and "securities for money;" "or" might, if necessary, be read as "and;" the intention plainly was, that the residue of either "moneys" or "securities for money," and of both, after paying the small legacies, should pass. *Re Ingram*, 95..

4. *Construction — Charitable Gifts—Inaccurate Description of Objects—Ascertainment by Evidence—Undisposed of Residue—Claim of Executors to Beneficial Enjoyment—Trustee Act, R.S.O. 1914, ch. 121, sec. 58—Indication to Contrary in Will—Provision for Remuneration of Executors — Claim of Charities to Residue—General Gift for Charitable Purposes—Testator Leaving no Next of Kin—Executors Holding in Trust for Crown—Inquiry for Claimants—Bounty of Crown.*—By his will the testator gave the whole of his property to two persons as trustees and executors "for the purposes after-named." The whole estate was of the value of about \$12,000. He then gave seven specific legacies, amounting in aggregate value to \$9,300, to different charitable institutions. He made no disposition of the residue. He appointed the executors "for the consideration of 8 per cent. of the whole estate as set forth in this my will." The description in the will of the institutions to be benefited was inaccurate, and there was some uncertainty as to what institutions were intended. Upon evidence sub-

WILL—(Continued).

mitted, an order was made determining the objects of the testator's bounty.—The clause above quoted was construed as giving the executors a commission of 8 per cent. on the whole estate as remuneration for their care, pains, and trouble.—The testator, so far as known, was the last of his family; he was unmarried, and had no relations:—*Held*, that the provision made for the executors indicated that the testator did not intend them to take the residue beneficially; and, by virtue of sec. 58 of the Trustee Act, R.S.O. 1914, ch. 121, they held the residue in trust for the next of kin, who would take upon an intestacy, if there were next of kin; and, there being no next of kin, the executors held for the Crown.—*Middleton v. Spicer* (1783), 1 Bro. C.C. 201, followed.—*Held*, also, that the gifts of named amounts to named charities could not be construed as carrying with them a gift of the residue or surplus for distribution among the named charities; nor could a general gift for charitable purposes be implied.—*Held*, also, that there should not be an inquiry as to claimants; any meritorious claim would, no doubt, be recognised by the Crown. *Re Aspel*, 191.

5. *Construction — Devise of House and Premises—Addition to Premises after Date of Will—Whole Passing by Devise—Will Speaking from Death—"Contrary Intention"—Wills Act, sec. 27.*—

WILL—(Continued).

A testator, dying in 1912, by his will, made in 1907, gave his "house and premises on M. street" to his widow for life, and on her death or remarriage to his children then living, and the residue of his estate to her absolutely. At the date of the will, the testator owned a house in M. street built on 20 feet of land; the testator afterwards purchased and owned at his death 55 feet to the west:—*Held*, a contrary intention not appearing by the will (sec. 27 of the Wills Act), that the will must be read as if it had been executed immediately before the testator's death, and the whole property in M. street passed under the devise.—The established rule of construction is stated in *Re Ingram* (1918), 42 O.L.R. 95.—When the thing given remains, and has been added to between the date of the will and the date of the death, the whole property answering the description at the later date passes.—*In re Willis*, [1911] 2 Ch. 563, *In re Portal and Lamb* (1885), 30 Ch. D. 50, *Morrison v. Morrison* (1885) 10 O.R. 303, and *Hatton v. Bertram* (1887), 13 O.R. 766, referred to. *Re Rutherford*, 405.

6. *Construction—Gifts to Children—Gifts over in Event of Children Dying without having Received their Portions—Contest between Executors and Children of Deceased Child of Testator—Effect of Divesting Clause—Intention of Testator—Period of Division—Discretion of Executors.*] — The

WILL—(Continued).

testator, dying in 1887, by his will set apart his house as a home for his wife and family, and then gave all his estate to his executors in trust to convert and use for the maintenance of his wife and family and to pay certain sums to his sons, and, at such time after the expiration of five years from his decease as might seem advisable to the executors, to divide among all his children, share and share alike, all his estate, save such portions as the executors might retain to provide from the interest for the wife and family residing in the home—stead, any balance of income being divided yearly among all his children. The will further provided that on the death of the widow the income should be divided until the time for division previously referred to; and "in case of any of my children should die without having received his or her portion . . . and leaving issue him or her surviving at the time a division of the estate shall be made among my children the child or children of such of my children so dying shall represent and receive their deceased parent's share but if any of my children should die leaving no issue him or her surviving the share or portion herein given . . . to such child shall revert to and become part of my estate and be equally divided among all my surviving children." The executors kept the estate intact until the widow died (in 1917 or 1918), and after her death paid

WILL—(Continued.)

over to the executors of a son, who had died in 1907, leaving children, a sum representing part of his share in his father's estate:—*Held*, that the children of the deceased son took under the will of their grandfather, whose executors ought to have paid to those children the sum aforesaid.—The gift was to the children of the testator, subject to be divested in favour of the child or children of such of the testator's children as should die before the actual receipt of their shares, leaving children surviving.—Where the testator has intended the gift over to take effect, and there has not been actual payment, effect must be given to that intention.—*Kirby v. Bangs* (1900), 27 A.R. 17, 29, and *Johnson v. Crook* (1879), 12 Ch. D. 639, followed. *Re Mitchell*, 340.

7. *Construction—Life-estate—Remainder—Power of Executor to Sell and Convey Land—Trust for Sale—Surviving Executor—Trustee Act, secs. 44, 49—Devolution of Estates Act, secs. 13, 14, 15, 19, 21, 23—Caution—Directions—Sale for Purpose of Distribution—Persons Entitled under Will—Brothers and Sisters “or their Heirs”—Period of Ascertainment—Brothers of Half Blood—Living Heirs or Issue of Deceased Brothers and Sisters—Per Stirpes Division.*—W., by his will, made in 1861, appointed his wife and two other persons executors. He died in the same year; his wife died in September, 1917; one of

WILL—(Continued).

the other executors survived her. W. willed and bequeathed to his wife during her natural life the whole of his real and personal property, including his farm. The will then provided that, if it should be unsuitable for his wife to live on the farm, “she may if she deems it to be for her greater convenience with the advice and management of my executors dispose of the whole or part of the farm . . . to invest in other property provided always that whether this may be done or not the property belonging to her as coming from me shall at her death be disposed of in any way satisfactory to my executors so that all my brothers and sisters together with all my wife's brothers and sisters or their heirs shall have personally an equal”—here a word seemed to be omitted—“in it share and share alike.” The farm, at the date of the death of the wife, remained unsold:—*Held*, that the testator had effectively disposed of the fee simple remainder in the farm—there was no intestacy.—(2) That the case was not governed by the Devolution of Estates Act, R.S.O. 1914, ch. 119, or dependent upon it; that the property did not vest immediately upon the death of W.; that the will created a trust for sale; and that the executors, under the Trustee Act, R.S.O. 1914, ch. 121, sec. 44, and the survivor of them, under sec. 49, had power to convey the farm, without the concurrence of the beneficiaries, he having agreed to sell and con-

WILL—(Continued).

vey to one S.—(3) That, for the greater security of the purchaser, a caution might be registered under the Devolution of Estates Act; and directions were given accordingly: see secs. 13, 14, 15, 19, 21, and 23 of that Act.—(4) That the right of each of the primary beneficiaries to take was not absolute, but contingent upon his being alive at the death of the testator's wife, the period of distribution.—(4) That "brothers and sisters" included those of the half blood.—(5) That the persons entitled to share in the remainder were to be ascertained at the date of the death of the testator's wife; the property was to be divided into as many shares as there were brothers and sisters of the testator and his wife then alive and brothers and sisters who had died leaving "heirs" (issue) then alive; the aggregate of the "heirs" of any deceased brother or sister to take only the share the brother or sister would have taken had he or she survived; and that share to be distributed according to the number of the "heirs" in each case and their relationship to the person for whom they were substituted, according to the Statute of Distributions. *Re Waugh, Re Scott and Scott*, 87.

8. Construction—"The Whole of My Money of which I Die Possessed"—*Legacy Vested in Testator but not Paid until after his Death.*—In 1882, K., by a trust disposition and settlement, directed her trustees to make

WILL—(Continued).

payment, within twelve months after the death of her sister, to C., of a legacy of £800. K. died in 1885; C. in 1887; and K.'s sister in 1915. Some time after the last date, K.'s trustees paid the £800 to the administrators *de bonis non* with the will annexed of the estate of C. By the first paragraph of the will of C., he bequeathed to his wife "the whole of my money of which I die possessed to be used by her for the benefit of the family." He then bequeathed to his daughter certain books specifically described, and proceeded, "I bequeath to my eldest son . . . the remainder of my personal effects," and added particular injunctions as to the care of a ring, military decorations, and documents: — *Held*, that the legacy from K. was money; ie became vested in C. upon the death, in his lifetime, of K., although the payment was postponed; and, under the words "the whole of my money of which I die possessed," it passed to the widow of C.—the words "of which I die possessed" not limiting the bequest to money actually in hand at his death. *Re Cotter*, 99.

9. Perpetual Trust for Care of Grave — *Legislative Sanction — Cemetery Act, R.S.O. 1914, ch. 261, secs. 2 (c), 14.*—A direction in a will to the executors to deposit a sum in a bank or invest it, "the yearly interest to be devoted to the care of my grave," creates, leaving statutory pro-

WILL—(Continued).

visions out of consideration, a perpetual trust; and, as the purpose is not charitable, is void; but legislative sanction is given to this particular form of perpetual trust, by the Cemetery Act, R.S.O. 1914, ch. 261, sec. 14, especially sub-sec. 4; and, where there was such a direction in a will, it was declared that the executors might pay over the sum mentioned to the "owner," i.e., the person owning, controlling, or managing a cemetery (sec. 2 (c)), making an agreement with him as contemplated by the statute. *Re Jones*, 62.

See INSURANCE, 3, 5.

WINDING-UP.

See COMPANY, 5, 6.

WITNESSES.

See HUSBAND AND WIFE, 4—
LIBEL.

WORDS.

"Abstractedly."—See LANDLORD AND TENANT, 1.

"Analogy thereto."—See COSTS, 4.

"And."—See WILL, 3.

"As Required."—See CONTRACT, 1, 2.

"Assets Liable for Satisfaction of Judgment."—See WRIT OF SUMMONS, 2.

"Buildings and Improvements."—See LANDLORD AND TENANT, 1.

"Buildings Erections or Improvements."—See LANDLORD AND TENANT, 1.

"Buildings Fixtures or Things."—See LANDLORD AND TENANT, 1.

WORDS—(Continued).

"Cause of Action upon a Contract."—See WRIT OF SUMMONS, 2.

"Contrary Intention."—See WILL, 3, 5.

"Day."—See COSTS, 3.

"Duplex House."—See ONTARIO TEMPERANCE ACT, 1.

"Effect other Insurance thereon."—See INSURANCE, 1.

"Fixtures."—See LANDLORD AND TENANT, 1.

"Just and Convenient."—See DISCOVERY.

"Just and Proper Value."—See LANDLORD AND TENANT, 1.

"Matters of Account."—See REFERENCE.

"Moneys or Securities for Money."—See WILL, 3.

"Object."—See MUNICIPAL CORPORATIONS, 3.

"Or."—See WILL, 3.

"Personal Estste."—See INSURANCE, 3.

"Private Dwelling-house."—See ONTARIO TEMPERANCE ACT 1.

"Renewal Value."—See LANDLORD AND TENANT, 1.

"Sum in Dispute."—See DIVISION COURTS, 2.

"The Whole of my Money of which I Die Possessed."—See WILL, 8.

"Title by Possession."—See VENDOR AND PURCHASER.

WRIT OF SUMMONS.

1. Foreign Corporation-defendant—Service on by Serving Person in Ontario—Agent with Limited Powers—Rule 23—Transacting or Carrying on Business in Ontario—Order of Judge in Chambers Re-

WRIT OF SUMS.—(*Continued*).
fusing to Set aside Service—Motion for Leave to Appeal—Rule 507.—An action was brought in the Supreme Court of Ontario against a railway company and a foreign steamship company for breach of duty in or about the carriage of goods. The writ of summons was served upon B., in Toronto, Ontario, as representing the steamship company. B. was the agent or representative in Toronto of a Canadian company, having its head office in Montreal, and that company was the agent in Canada of the foreign steamship company. Neither B. nor the Canadian company had anything to do with the arrangements for the shipping of the goods in respect of which the action was brought. The agency of the Canadian company for the steamship company was of a limited kind: it did not make contracts with shippers or passengers except on specific instructions, but received requisitions and forwarded them to the steamship company in New York:—*Held*, by MASTEN, J., in Chambers, that the Canadian company, through B., transacted or carried on some business in Ontario for the steamship company, within the meaning of Rule 23, and therefore the service upon B. for the company was good service. — Difference between Rule 23 and the English

WRIT OF SUMS.—(*Continued*).
 Order IX., Rule 8, pointed out. —*Okura & Co. Limited v. Forsbacka Jernverks Aktiebolag*, [1914] 1 K.B. 715, distinguished.—*Held*, by RIDDELL, J., in Chambers, refusing a motion (under Rule 507) for leave to appeal from the order of MASTEN, J., that there was no good ground to doubt the correctness of the decision. *Ingersoll Packing Co. Limited v. New York Central and Hudson River R.R. Co. and Cunard Steamship Co. Limited*, 330.

2. *Foreign Defendants—Service of Notice of Writ out of Ontario—Action for Declaration of Right to Make Calls on Company-shares—Rule 25 (1) (h)*—"Cause of Action upon a Contract"—"Assets Liable for Satisfaction of Judgment"—*Conditional Appearance.*] — The order of CLUTE, J., 40 O.L.R. 467, refusing to set aside the service of notice of the writ of summons on the defendant S. out of Ontario, was reversed, upon the appeal of that defendant, and the service set aside (MEREDITH, C.J.C.P., dissenting). — The plaintiffs appealed from the same order in so far as it provided that the defendant should have leave to enter a conditional appearance: upon that appeal no order was made except that the plaintiffs should pay the costs of it. —*Hughes v. Oxenham*, [1913] 1 Ch. 254, referred to. *Superior Copper Co. Limited v. Perry*, 45.

